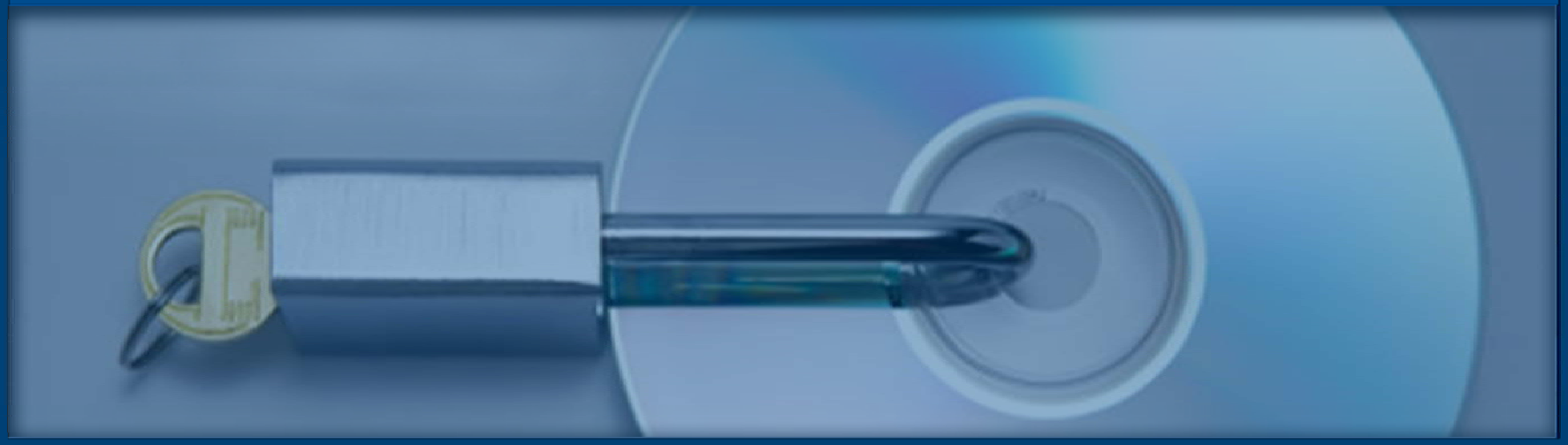
SCOTT IP
TECHNOLOGY ATTORNEYS



Hot Topics in Privacy & Security Law

Presented by Robert J. Scott
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Overview

Federal and State Statutory and Regulatory Issues

- HIPAA Privacy and Security Rules – 2009 Recovery Act extends HIPAA reach to business associates
- GLBA Safeguards Rules
- Data breach notification laws
- Data protection and destruction laws

Civil Liability

- Unfair Trade Practice Claims
- Negligence
- Breach of Contract
- Unlawful Trade Practices

Claim Scenarios

- TJX
- Radio Shack
- BJ's Wholesale Club
- Choice Point
- DSW
- Heartland
- Hannaford Bros

State Data Breach Notification Laws

State Data Breach Notification Laws

State	Time To Notify Consumers of a Breach of Personal Information	Civil or Criminal Penalties for Failure to Promptly Notify Customers of Breach	Private Right of Action	Exemption for Encrypted Personal Info	Exemption for Criminal Investigations or Information Publicly Available from Government Entities	Exemption for Immaterial Breaches
Arizona	Most expedient time possible, without unreasonable delay	●		●	●	
Arkansas	Most expedient time possible, without unreasonable delay	●		●	●	●
California	Most expedient time possible, without unreasonable delay		●	●	●	
Colorado	Most expedient time possible, without unreasonable delay	●		●	●	●
Connecticut	Immediately			●	●	●
Delaware	Immediately, in the most expedient time possible, without unreasonable delay	●	●	●	●	
District of Columbia	Most expedient time possible, without unreasonable delay	●	●		●	
Florida	Without unreasonable delay	●		●	●	
Georgia	Most expedient time possible, without unreasonable delay			●	●	
Hawaii	Without unreasonable delay	●	●	●	●	
Idaho	Most expedient time possible, without unreasonable delay	●		●	●	●

Network Security and Privacy Injury Claims

- FTC Investigations
- State Investigations
- Privacy Causes of Action
- Mitigation Strategies

State Investigations

- State Consumer Protection Laws
- Breach Notification Violations
- Violations for Failure to Protect and Properly Destroy Customer Data

Private Causes of Action

- Breach of Contract Claims
- Third-Party Beneficiary Claims
- Contractual and Non-Contractual Indemnity Claims
- Tort / Negligence Claims
- Failure to Maintain Adequate Security
- Negligent Retention of Data
- Negligent Misrepresentation Regarding Breaches in Security

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HOT TOPICS IN PRIVACY AND SECURITY LAW

April 7, 2010

Rachel Simon
Regional Underwriting Manager
Dallas & Houston Regions

CHARTIS

Key Areas of Exposure

Financial Account Information

- Credit card data
- Bank account and PIN information

Protected Healthcare Information

- Benefit Information
- Employee Health Information

Personally Identifiable Information (PII) *of Customers, Constituents, Clients, Employees*

- Social Security Numbers
- Drivers License Information
- Addresses
- Medical Records

Confidential Corporate Information

Public Infrastructure

Network and Privacy Threats

- Unauthorized Access/Unauthorized Use
- Virus/Malicious Code
- Theft or Destruction of Confidential Corporate Information
- Theft or Exposure of Personal Identifying Information
- Theft or Exposure of Protected Health Information
- Cyber Extortion

Data Breach and ID Theft Impacts

- Bad press/Reputational damage
- Unbudgeted expenses
- Dissatisfied customers and employees
- Loss of customers/employees
- Regulatory investigations
- Lawsuits
- Lost Business/Revenue
- Damage to Balance Sheet

Exposure Trends…

- **285 Million** records were breached in 2008, which is more than the previous four years combined
- **87%** of breaches were considered avoidable through simple or intermediate controls
- **67%** of breaches were aided by significant error
- **91%** of all compromised records were linked to organized crime

"It's impossible to create an environment where you cannot have a data breach."

- Larry Ponemon of the Ponemon Institute

- 2009 institute findings:
  - The average cost of a breach: $6.75M dollars, up from 2008 and 2007
  - The average per record cost of a data breach is $204, up from 2008 and 2007
  - Errors of Third Parties (information holders) make up 42% of all breaches

Risk Management Questions

- Do **You** have physical and system access controls in place?
- Do **You** have documented procedures for firewall, intrusion prevention, anti-virus, patch management?
- Do **You** have encryption tools to ensure integrity and confidentiality of sensitive data including data on removable media?
- Do **You** have a program in place to periodically test security controls?
- Does **Your** hiring process include the following: criminal, credit, references, drug screening?

Risk Management Questions

- Do **You** implement policies and procedures to ensure compliance with legislative, regulatory and/or contractual privacy requirements that govern your industry?
- Have **You** assigned the responsibility for Information Security & Privacy to a senior manager?
- Do **You** have an entity-wide Information Security & Privacy Policy and an Information Security Incident Response Plan in place?

Risk Management Questions

- Do **Your** contracts require defense and indemnification?
- Do **Your** contracts require vendors to maintain adequate security of information?
- Do **You** require vendors to maintain security and privacy insurance?

What Coverage is Available?

Traditional insurance products do not respond:

(GL, property, crime, D&O, E&O)

Security and privacy coverage (sometimes called cyber liability) responds to:

- Failures of Network Security
- Privacy Events
- 3rd and 1st Party losses should be covered

Security & Privacy Liability Coverage

Policy responds to security failures and privacy events

- Computer attack against an **insured**
- Wrongful disclosure or breach of private or confidential data, including corporate data
  - Security and Privacy Liability (3rd party)
  - Event Management (1st party)
  - Information Asset (1st party)
  - Network Interruption (1st party)
  - Cyber Extortion (1st party)

Insurance Considerations

- Limits and retentions
  - Entity size
  - Industry
  - Risk appetite
- Comparing policy language
- Comparing carrier advantages
  - Professional experience: underwriters, claims staff, defense counsel
- Securing choice of counsel

Questions