



Goals of Cyberattackers

- Industrial Espionage
- Blackmail
- Data Ransom
- Fraud
 - Obtain goods for use or resale
 - Obtain financial account access
 - Obtain new credit accounts
 - Present fictitious insurance claims
 - Divert tax refunds or other payments

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Legal Response To A Breach

- Engage counsel early to assist with:
 - Compliance with state breach notice statutes
 - Regulators/AGs
 - Litigation holds
 - Engagement of forensic investigators for benefit of privilege
 - Prepare to defend litigation
 - Assess insurance requirements/availability

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Current Law: Notice of Breach

- 48 Separate State Laws (including DC)
 - All but AL, NM & SD
 - Definition of sensitive personal information
 - Combination of data elements that will reveal private information or allow access to a financial account
 - CA: Impairment of password security may qualify
 - Timing
 - Content of notice
 - Consequences of violation
 - Administrative enforcement
 - Private litigation
- Medical Data (HIPAA [federal], CMIA [California])

Possible Federal Legislation

- Opportunity for Compromise?
 - Consumers can be offered broad federal protection
 - Business can be offered uniform rules and protection from private litigation
- Many stakeholders with differing goals
 - President
 - Congress
 - FTC
 - State Attorneys General (NY, CT, IL extremely active)
 - Consumer advocates
 - Business

Possible Federal Legislation

- How broadly should "Sensitive Personal Identifying Information" be defined?
- How broadly should "Security Breach" be defined?
- What should be the notice deadline?
- How much authority should be delegated to FTC?
- Should there be a private right of action for violations?
- How broadly should federal law preempt state law?

Current Law: Consumer Remedies

- Breach Notice Often Leads to Litigation
- Prophylactic Offer of Credit Monitoring and Identity Theft Insurance
 - Mandated in California as of January 1, 2015: “an offer to provide appropriate identity theft prevention and mitigation services ... at no cost to the affected person for not less than 12 months”
 - Uncertainty as to what is “appropriate” ID theft protection
 - New risk: pending U.S. Postal Service NLRB proceeding
- Actual Fraud Is Rare and Hard to Tie to Any Particular Event. SO WHAT ARE THE CLAIMS?

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Current Law: Consumer Remedies

- Claims for Violation of Breach Notice Statute
 - Timing
 - Content
 - Insufficient Reach
- Fair Credit Reporting Act
 - “Consumer Report”
- Public Disclosure of Private Facts
 - Intentional Tort
 - “Public” Disclosure

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Current Law: Consumer Remedies

- Breach of Contract/ Unfair Trade Practices
 - Implied agreement to keep data safe
 - False advertising suggesting data will be safe
- Negligence
 - Failing to use due care in maintaining data security
 - Foreseeability
 - Special Relationship
 - Negligence per se for violating a statute or industry guideline (PCI standards)
 - Economic Loss Rule

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Current Law: Consumer Remedies

- Damages and Causation Issues
 - Emotional Distress
 - Not certifiable
 - No physical manifestation
 - Consumer Self-Help to Prevent ID Theft
 - Reasonable in light of breach?
 - Reasonable rejection of company credit monitoring offer?
 - Compensation for time spent if no out-of-pocket expenses?

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Current Law: Consumer Remedies

- How to compensate consumers for reasonable protective measures without overpunishing or overreacting to minor breaches?
- *In re Target*
 - Court addressed the issue in the abstract, but found that sufficiently severe impact was pleaded.
 - Proposed settlement: \$10MM claims fund but claimants must attest to or prove out-of-pocket loss

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Current Law: Consumer Remedies

- Standing – *Clapper v. ACLU*
 - When is injury “imminent”?
 - Is fear of future injury enough?
 - How significant must the risk be to justify spending money?
- *Spokeo v. Robins* (pet. for certiorari pending)
 - Injury-in-Law v. Injury-in-Fact
 - Harm to legal interest with no real-world impact

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Current Law: Consumer Remedies

- *Clapper and Spokeo*
- No Private Action to Abate a Public Nuisance
- Is Increased Statistical Likelihood of Harm Sufficient to Confer Standing?
 - Similar issue in environmental law
 - Exposure without physical manifestation
 - Medical monitoring claim?
 - Some data has short half-life; some doesn't
 - Password-only breach?
 - Account number breach?
 - SSN/DOB/Biometric breach?

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Current Law: B2B Remedies

- Mostly contractual
 - Merchant/ Card Network/ Issuer Claims
 - Determination of PCI Compliance
 - Penalty Plus Payment of “Incremental Fraud Loss”
 - System Works Best for Small Breaches
- Negligence
 - Small Card Issuer vs. Big Merchant (Target)
 - Similar Defenses as in Consumer Cases

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Current Law: B2B Remedies

- Statutory Claims
 - Which party is responsible to give notice of breach?
 - Target: Minnesota Plastic Card Security Act
 - Unique statute
 - Strict liability for theft of data “stored” longer than is necessary
- Indemnity Claims

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