

Reducing and Eliminating Cyber Liability

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AGENDA

RISK ASSESSMENTS

INSURANCE

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LAURENCE GONZALES

AUTHOR, SURVIVAL EXPERT

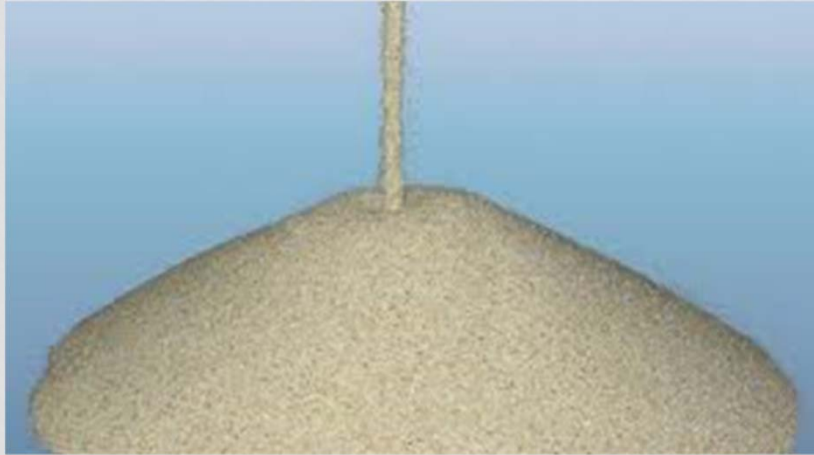
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DEEP SURVIVAL

WHO LIVES, WHO DIES AND WHY

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SAND PILE EFFECT

COMPLEX SYSTEMS AT SOME POINT FAIL

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LOST

A BREACH IS UNFAMILIAR TO US

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SUDDEN AND UNEXPECTED

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THREATS TO SURVIVAL ARE REAL

“A NEW KIND OF WAR IS UPON US, ONE CHARACTERIZED BY COERCION RATHER THAN THE USE OF FORCE...IN ANOTHER AGE...THE CLOAK-AND-DAGGER DOINGS OF GLOBAL POWERS REMAINED DISTINCT FROM THE DAY-TO-DAY OPERATIONS OF BUSINESSES. NOW, THEY ARE HOPELESSLY ENTANGLED.”

Chris Mims, *In Cyberwarfare, Everyone is a Combatant*, THE WALL ST. JRNL. (July 23, 2017)

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SO HOW DO WE SURVIVE?

"WE MUST PLAN."

Deep Survival, p. 85

**"LUCK FAVORS THE PREPARED
MIND."**

Deep Survival, p. 174

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TO PLAN, KNOW THE RISKS

- COMPLIANCE RISKS
- GOVERNMENT ENFORCEMENT RISKS
- CONSUMER CLASS ACTION RISKS

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COMPLIANCE RISKS

“BE OPEN TO WHAT’S CHANGING AROUND YOU”

Deep Survival, p. 80

“THE SURVIVOR DOES NOT IMPOSE PREEXISTING PATTERNS ON NEW INFORMATION”

Deep Survival, p. 122

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COMPLIANCE RISKS

- **INTERNATIONAL LAWS** IMPACTING U.S. BUSINESS
- **50 STATES** NOW HAVE BREACH NOTIFICATION LAWS
- AT LEAST **32 STATES** HAVE DATA DISPOSAL LAWS
- AT LEAST **14 STATES** HAVE DATA SECURITY AND PRIVACY LAWS
- AT LEAST **3 STATES** HAVE VENDOR ASSURANCES LAWS
- AT LEAST **3 STATES** HAVE BIOMETRIC DATA LAWS

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COMPLIANCE RISKS

- 1 APPLY TO ALL BUSINESSES
- 2 EMPHASIZE PRIVACY RIGHTS & GREATER CONSUMER CONTROL
- 3 VOLUMINOUS, COMPLEX AND LACK UNIFORMITY
- 4 ACCOUNTABILITY
- 5 VARIOUS EXPOSURES

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ENFORCEMENT RISKS

**"SURVIVORS AREN'T FEARLESS. THEY USE FEAR.
THEY TURN IT INTO ANGER AND FOCUS."**

Deep Survival, p. 175

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GOVERNMENT ENFORCEMENT

FTC Enforcement Trigger = Unfair or Deceptive Act

- **§ 45(a)** MAKES UNFAIR OR DECEPTIVE ACTS/PRACTICES UNLAWFUL
- **§ 45(n)** DEFINES “UNFAIR”
 - a. **PRACTICE CAUSES OR IS LIKELY TO CAUSE SUBSTANTIAL INJURY TO CONSUMERS**
 - b. INJURY IS NOT REASONABLY AVOIDABLE BY CONSUMERS THEMSELVES AND
 - c. NOT OUTWEIGHED BY COUNTERVAILING BENEFITS TO CONSUMERS OR TO COMPETITION.

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GOVERNMENT ENFORCEMENT

FTC-Enforcement Targets

- DATA BREACH INVOLVING CONSUMER DATA
- DECEIVING CONSUMERS AS TO ALLEGED DATA SECURITY AND PRIVACY PRACTICES
- FINANCIAL HARM
- PRIVACY INJURIES THAT AFFECT HEALTH AND SAFETY
- UNWARRANTED INTRUSIONS INTO PRIVACY
- REPUTATIONAL INJURY/EMOTIONAL DAMAGE

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GOVERNMENT ENFORCEMENT

FTC-Recent Decisions/Activity

- *In re LabMD* (11th Cir. 2018)
- Paypal Venmo Enforcement Action
- Lenovo Enforcement Action
- Uber Enforcement Action

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GOVERNMENT ENFORCEMENT

HHS (OCR)-Enforcement Trigger =

A Covered Entity, its Business Associate, or their respective agent(s) Violates HIPAA

- Fail to conduct and document “an accurate and thorough risk analysis”
- Fail to use encryption “when it [is] reasonable and appropriate to do so under the circumstances.”
- Failure to *implement* policies and procedures
- Failure to secure a written Business Associate Agreement

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GOVERNMENT ENFORCEMENT

HHS (OCR)-Enforcement Activity

**NO PRIVATE RIGHT OF ACTION, BUT FINES BETWEEN
\$100-\$50,000 *PER VIOLATION***

- 21st Century Oncology, \$2.3M, Dec. 2017
- Fresenius Medical Care, \$3.5M, Feb. 2018
- MD Anderson Cancer Center, \$4.3M, June 2018
- Anthem, \$16M, Oct. 2018

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CONSUMER CLASS ACTIONS

"TO ACT IS HUMAN; TO SUCCEED, CRUCIAL."

Deep Survival, p. 198

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CONSUMER CLASS ACTIONS

- **THEY ARE INEVITABLE**
- **THEY ARE COSTLY IN THE DEFENSE AND IN THE RESULT**
 - **ANTHEM \$115 MILLION**—BIGGEST “DIRECT TO CONSUMER” SETTLEMENT
 - **YAHOO \$85 MILLION**
- **YOU MAY SUCCEED IN THE EARLY STAGES**

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CONSUMER CLASS ACTIONS

GIVE YOURSELF GOOD CONTRACT DEFENSES

- ARBITRATION W/ “NO CLASS ACTION” CLAUSES
- CHOICE OF FORUM AND CHOICE OF LAW CLAUSES
- LIMITATION OF LIABILITY AND DAMAGES CLAUSES

MAKE SURE IT'S DONE RIGHT

Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017)

Cullinane v. Uber Techs., Inc., 893 F.3d 53 (1st Cir. 2018)

Varela v. Lamps Plus, 701 F. Appx. 670 (9th Cir. 2017)

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CONSUMER CLASS ACTIONS

FIGHT ON STANDING

- INCREASED RISK OF HARM-USE *CLAPPER*
- STATUTORY STANDING-USE *SPOKEO*
- NEW: LOST TIME VALUE OF MONEY-*DIEFFENBACH V. BARNES & NOBLE, INC.*, 887 F.3D 826 (7TH CIR. 2018)

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CONSUMER CLASS ACTIONS

OTHER THINGS TO BE MINDFUL OF

- THE CONTRACT CLAIMS: WATCH WHAT PROMISES YOU MAKE ABOUT PRIVACY AND SECURITY
- THE INCREASING BIOMETRIC DATA LITIGATION
- THE FCRA CLAIMS
- LEGISLATIVE RELIEF? THE SAFETY ACT

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DEEP SURVIVAL OF THE BREACH

THE SINKING OF THE YACHT TRASHMAN

AKA

*"WE'RE ALL GOING TO F*****' DIE"*

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DEEP SURVIVAL OF THE BREACH

- BREACH RESPONSE PLAN
- HAVE A SURVIVOR MINDSET
- KEEP YOUR HORIZON SHORT
- DON'T GET TOO TIED TO THE PLAN
- HAVE A RESCUER MINDSET

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THANK YOU

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