



REPUTATION DAMAGE CONTROL

INSURING THE COST OF MITIGATING REPUTATIONAL HARM FOLLOWING A CYBER-ATTACK OR DATA BREACH

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Companies in nearly every industry face a daily and increasing risk in relation to cyber attacks and data security breaches. Some have learned the hard way that the resulting damage to the reputation of the corporate entity, or one or more of its brands, can be even more financially impactful than the actual costs and third-party claims suffered as a result of such a data breach.

Last year's Target data security breach, and the massive wake of negative publicity that immediately followed, clearly showed that a single data security breach incident, whether instigated by external hackers or by insider disgruntled employees, can have a massive short and long-term financial impact on the corporate entity. Short-term ex-

penditures may include: investigating the incident; stopping the breach from continuing and/or being replicated; rectifying, rebuilding, or reinforcing its internal security systems; and then the follow-on costs of compensating third parties such as consumers, suppliers and banks for any financial loss and damage they have suffered as a result of the data breach.

Whilst these expenses and costs can be defrayed by way of cyber liability insurance, itself a relatively new insurance product developed to deal with the loss of intangible property and these short-term financial repercussions, typical cyber liability insurance products do not provide protection or support for what is potentially a much bigger

issue – that of the reputational damage suffered by the corporate entity. Especially in this new world of trigger-happy tweeting and the viral spread of negative publicity, the resulting plummet of public opinion could ultimately lead to a company-fatal event.

Most cyber liability insurance policies (CLIPs) appear to provide some financial recompense for the costs of crisis management. But the real value of such crisis cover to the insured corporate entity is, quite frighteningly, nothing at all.

This is because most CLIPs limit the amount of the crisis cover provided to the costs of a public relations consultant chosen and appointed by the insurer, and only once its consent has been given following a review

of the coverage position under the CLIP. This, of course, causes a significant delay to the insured in attempting to mitigate or neutralize the reputational damage, limits the insured as to whom it can engage to provide the services, and limits the scope of the services required. Also and very significantly, the amount of the financial cover provided is usually a very small percentage of the limit of indemnity (LoI) for the CLIP. This, if used, reduces the LoI and/or is only available if the LoI has not been expended in dealing with the covered data breach claim (as was the position in the Target claim under its CLIP), or is a very small fixed-dollar sub-limit. For example, in a CLIP with a \$10 million LoI, this can be as low as \$25,000 (a negligible amount in the world of crisis management fees) and where such a CLIP may have an “each and every claim” excess of \$50,000, that will be applied.

However there is some good news in that stand-alone reputational risk insurance products are now beginning to emerge. These have been specifically designed to help insureds identify the appropriate specialized service providers – and to indemnify the associated high costs – required to mitigate and neutralize the impact of the reputational damage suffered by the insured following a cyber attack, data breach, or other type of crisis event.

Most of these reputational risk insurance products cover the costs incurred in employing crisis communication consultants, public relations agencies, specialist lawyers, digital communication experts, media communication consultants, polls and market research services providers, and other necessary professional services. There are also varying options in respect of LoIs of anywhere from \$1 million to \$25 million, self-insured excesses, co-insurance and length of policy period.

While these products offer a much better and broader support and cost-defraying mechanism for the insured, there are still significant issues that must be dealt with and agreed between the parties (via, we strongly recommend, a specialist insurance broker who understands the reputation arena) prior to inception of the reputational risk insurance policy (RRIP) in order for the cover provided to be a properly effective tool. The insured must take into account that the premium likely to be demanded by the insurer will be very high compared to most standard insurance products i.e., 3–10 percent of the LoI. That, however, needs to be set against the average cost of around \$100,000 for just the first week of the engagement of a crisis communication consultant.

The most important issues to be con-

sidered and dealt with prior to inception of the RRIP are:

1. What constitutes a crisis event that damages or potentially damages the insured's reputation, triggering cover under the RRIP?

Some RRIPs define this as the notification of a claim under any other insurance policy the insured has in effect, whereas some RRIPs will have finite, defined crisis events only. However there are one or two RRIPs which have a combination of both of the above and allow for additional crisis events to be defined by the insured prior to inception and which are usually the subject of additional premium.

2. Can the insured instruct the specialized service providers required immediately after the crisis event damaging the insured's reputation occurs, so as to ensure and maximize the mitigation potential?

At least one insurer in its RRIP provides a “threshold” level of costs that can be incurred by the insured (subject to compliance with the RRIP's terms and conditions) before the insurer's consent is required. This takes away any time delay and allows for the immediate retention of the required service providers which should also help to reduce the ultimate costs incurred in attempting to mitigate the reputational damage suffered.

3. Can and do the suite of specialized service providers need to be agreed upon with the insurer before the RRIP? If so, who provides the recommendations for these providers?

Some insurers already have a general panel of service providers where rates and service-level agreements have been negotiated. However, the insured is normally able to recommend specialized service providers in its field, and those can then be vetted and approved by the insurer and named in the RRIP.

4. Subject to the LoI of the RRIP not being reached, how will it be determined that the reputational damage suffered by the insured following a crisis event has been mitigated, signaling that any ongoing costs will no longer be paid by the insurer?

This issue raises further questions that may or may not be set out in the RRIP. For example, if the decision is to be made by the insurer, it should be able to demonstrate to the insured's satisfaction that it has the in-house expertise. If it is to be left to the agreed crisis communications consultant or

other service provider, how is the inherent conflict in so doing to be dealt with? If an independent reputational monitoring agency is to be used to provide algorithmic analysis, are both parties happy to abide by the findings, as it is likely the monitoring agent's costs will be paid for by the insurer? If a dispute arises between insured and insurer with regard to this issue, is an independent arbitrator to be agreed upon and is there a dispute resolution mechanism contained in the RRIP wording?

The current reputational risk insurance products in the market deal with some or most of these issues – but none deals with all. However, as this is a very new market for insurers and each is trying to establish itself as the market leader, it is fair to speculate that most will be willing to bespoke their RRIPs based on the specific requirements and recommendations of the insured prior to inception. Indeed, from an insured's point of view, it is an opportune time to be involved in the development of an insurance product that is likely to become more costly with tighter coverage clauses as the claims related to such RRIPs develop over time.

As a footnote, some, although very few, insurers have tried to take things a step further and, either in addition to the above product or as a stand-alone product itself, indemnify the insured in respect of the financial loss it has suffered as a result of the reputational damage inflicted following a crisis event. However, in a very new and specialized insurance product and market, the potential coverage issues and likely massive cost of such insurance premium mean this is probably a step too far. In our opinion this should be regarded as an area to be explored by insureds, their lawyers, and their brokers once they have negotiated the reputational risk insurance product and put it to the test.



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