

Cyber Incidents – Contracts and Recovering Damages

In July 2021, I shared several educational posts on my [LinkedIn Page](#). These posts shared a common theme – bad actors doing bad things. Specifically, I pointed out four common activities perpetrated by cyber criminals and threat actors. The activities included brute force attacks, phishing, credential stuffing, and malicious software or malware. Most companies protect themselves from such attacks in three ways; (1) they have internal staff responsible for maintaining a high degree of security and data protection for the company; (2) they outsource security services to a qualified third-party, or (3) they use a combination of both approaches. Regardless of which option they use, a cyber incident can have significant implications for any business. Your business can be shut down for an extended period of time, you may be in legal peril or face the risk of ceasing operations entirely. What if you are doing all the right things from a security perspective and this happens to you? Can you seek and recover damages from a third-party service provider you have contracted with if your business is a victim of a cyber incident?

Contracts

If you rely entirely on your own team to maintain a high degree of security and data protection, then your options to recover damages may be limited. However, your team may be relying on purchased software or other vendor support tools. If that is the case and those tools fail, then perhaps you have a claim. Among several factors that may be assessed in such a case, a qualified expert witness would be able to provide an opinion on what the tool was supposed to do, what the vendor claims are regarding functionality and where it may have failed to provide those functions.

In a more likely scenario today where you outsource some or all of your security services to a qualified third-party service provider, claims following an incident can become much more complicated. Typically, a contract has been executed to cover the services provided with appropriate service level agreements and escalation protocols. Contracts, of course, vary widely based on the services being contracted. However, contracts should include key elements for security services including appropriate monitoring, alerting and incident response along with the required infrastructure and skilled resources to provide the services being offered.

A key component in any contract, including managed security services, includes the right to assess the third party's operation to ascertain whether it meets appropriate standards based on your industry regulations, your own policies and standards and the type of data you are accountable for protecting.

Typically, the first area of analysis and investigation in a legal matter involving the use of third party service providers are the contract and what the specific provisions state regarding the issue at hand. Was there a breach of contract that contributed to the issue? Is so, this may well be the basis for how damages are determined.

Necessary Expertise

It is essential to develop an effective contract for third party services that include the appropriate provisions to address an outsourcer's policies and any regulatory requirements specific to the industry in which they do business. I can provide technical expertise in the drafting of appropriate provisions for information security and data protection contracts for the use of third-party service providers. I have experience in what provisions to ask for, what can be provided and what can be enforceable. Determining if a third-party service provider has the appropriate qualifications and resources to provide high quality security services is an area in which I can provide assistance as well. Additionally, in the event of a security incident that results in legal activity, I can provide expertise in:

- Determining if failure in technology, processes inadequacies or resource deficiencies may have contributed to the event
- Understanding the event to attribute probable causation
- Prepare questions to ask in depositions, prepare for trial, serve as an expert witness and provide technical assistance
- Assist in determining strategies to recover damages when your business is a victim of a cyberattack involving your third party service provider

If you have any questions or would like more information, please [contact me](#). I would be happy to discuss your contract development needs and strategies to mitigate your cyber risk.

September 2021