Cybersecurity liability in the US: trends and perspectives

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Overview

• Regulatory landscape
• Content of rules and obligations
• Hot topics and trends
The regulatory landscape

EU

GDPR

US

Federal law

State law

Private obligations

Data Security Best Practices

Sources of Data Security Obligations

Federal Law:
- FTC Act
- Sector-Specific Regulation
- Consent Decrees (FTC, FCC, CFPB, other)

State Law:
- Unfair & Deceptive Acts & Practices Acts (UDAP)
- Data Breach Notification Laws
- Data Security Laws (some sector-specific)
- Private Claims

Private Ordering:
- Voluntary Frameworks/Standards (some sector-specific)
- Certification Authorities
- Contracts
The Substance of Data Security Obligations: Federal Law

**General**
- FTC Act: Unfair or deceptive trade practices
- Consent Decrees: “Common Law” Best Practices

**Sector-specific**
- Data-intensive or sensitive industries
  - Health, Education, Finance
- Statutes and agency regulations

The Substance of Data Security Obligations: State Government Enforcement

- **Data Breach Notification Laws***
  - All 50 states
  - Must notify consumers and Attorney General
  - Effects:
    - Reputational consequences
    - Risk of enforcement action
    - Result: internalization of costs

  - State Attorneys General – single lawsuits or multistate actions
  - Settlements: “assurance of voluntary compliance” agreements – best practices

- **Specific Data Security Statutes and Formal Guidance (Massachusetts, California)**

*precursors to GDPR
The Substance of Data Security Obligations: State Government Enforcement


“The Attorney General, unlike a private litigant ... is required only to prove that unfair or deceptive acts or practices took place in trade or commerce; she is not required to prove or quantify resulting economic injury. ... She is not required to allege or prove that any individual consumer was actually harmed .....”

The Substance of Data Security Obligations: Private Ordering Trends

• **Best practices** emerging from consent decrees and AVCs

• **Voluntary frameworks/standards** (e.g., NIST, CIS Controls)

• **Certification authorities** (e.g., CISSP) & licensure bodies

• **Growing privacy bar; rise of Chief Privacy Officers**
Hot Topics and Trends

• Standing
  • *Spokeo, Inc. v. Robins* – concrete injury required for standing
    • Tangible and possible intangible if recognized by law
    • Ongoing uncertainty in lower courts

• Harm
  • FTC: “substantial harm” required for FTC action.
  • States: more flexibility

• **Keep Your Eye on the States!**
  • Questions about FTC authority (*LabMD*) & political will
  • States as laboratories for progressive change

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Keep Your Eye on the States!