Florida Bar Business Law Section
Computer Law and Technology Committee
Hot Topics
January 17, 2019 Meeting
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1) California passes first-in-nation statute regulating Internet of Things devices
   a) SB No. 327 (link)
   b) Requires manufacturers of connected devices to equip the device with a reasonable security feature or features that are appropriate to the nature and function of the device, appropriate to the information it may collect, contain, or transmit, and designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure, as specified.
   c) "Connected device" means any device, or other physical object that is capable of connecting to the Internet, directly or indirectly, and that is assigned an Internet Protocol address or Bluetooth address.
   d) The statute expressly states no private right of action is created. Attorney General is responsible for enforcement.
   e) Goes into effect on January 1, 2020.

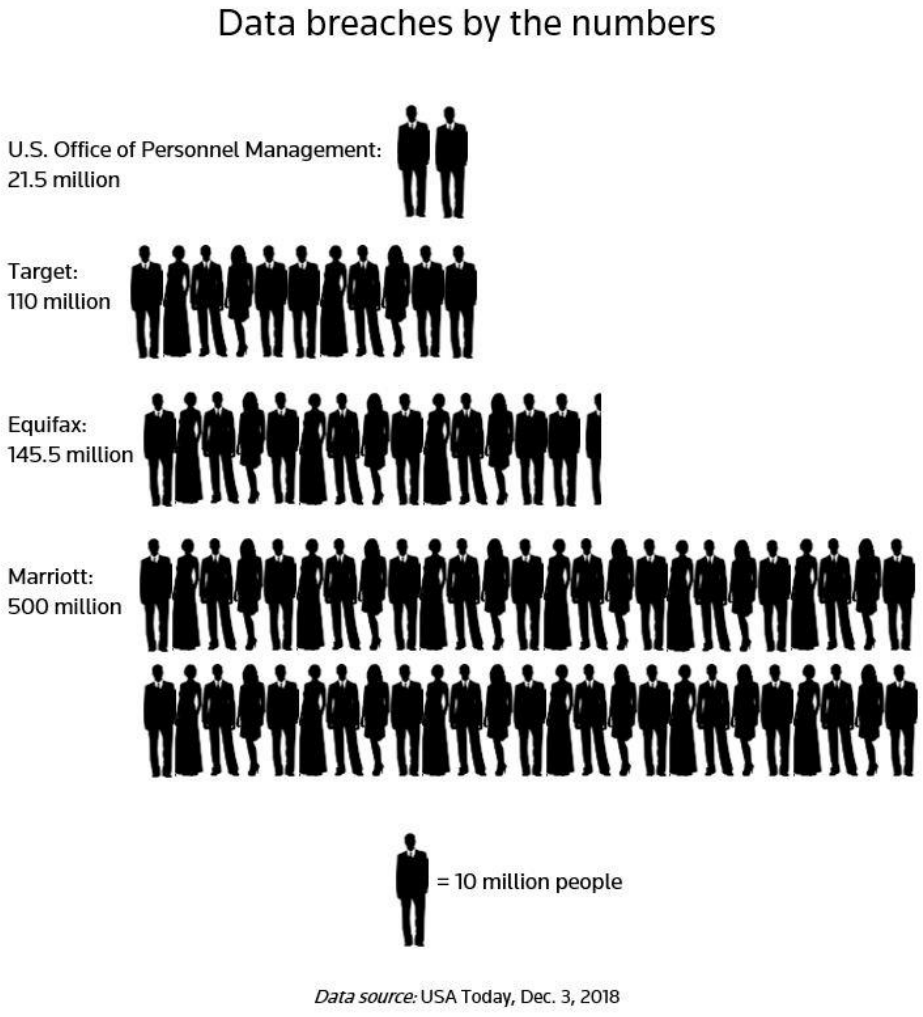
2) Brazil passes new data protection law with extra-territorial application (akin to the GDPR)
   a) The Brazilian General Data Protection Law ("Lei Geral de Proteção de Dados" or "LGPD"), passed by Congress on 14 August 2018, will come into effect on February 15, 2020.
   b) Very similar to the GDPR implemented in the European Union, the LGPD imposes strict regulations on the collection, use, processing, and storage of electronic and physical personal data.
   c) The LGPD applies to all private companies, government entities, and individuals that process personal data, regardless of location, provided that: (i) data is processed or collected in Brazil; or (ii) the processing operations have the purpose of offering or providing goods or services in Brazil.
   d) The LGPD establishes administrative and civil sanctions ranging up to 2% of an entity's revenue in Brazil, limited to BRL $50 million (approximately US$13 million), and including deletion or freezing of personal data until the violation has been resolved.

3) European Data Protection Board issues guidance on extra-territorial application of the GDPR to businesses in the US.
   a) Article 3 is supposed to answer the important questions of when the GDPR applies (depending on the location of an entity processing personal data, or of the individuals whose data is being processed). Unfortunately, Article 3 was drafted in a way that left many key concerns unanswered.
   b) The Guidelines provide some clarity around the scope and applicability of the GDPR to data Controllers and Processors both inside and outside the EU.

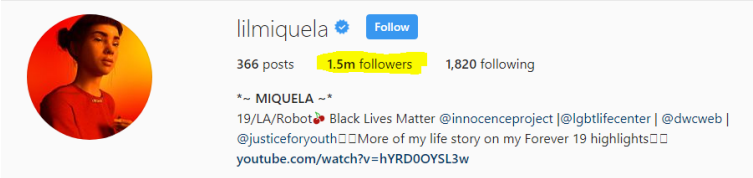
4) *MetroPCS Comm'ns v. Porter*, No. 3D17-375, 2018 WL 6786813 (Fla. 3d DCA Dec. 26, 2018)
   a) MetroPCS appealed an order denying its motion to enforce an arbitration provision contained in its terms of service with a former customer of prepaid mobile services.
   b) Following an evidentiary hearing, the trial court determined there was no agreement to arbitrate because Porter was not on notice of the arbitration agreement in the terms of service.
   c) MetroPCS argued Porter was on notice either as a result of (1) written documents at the time of sale; (2) pre-litigation text messages; and/or (3) post-litigation text messages.
   d) Reversing trial court's order denying motion to compel arbitration, the Third District held that Porter was on notice of the arbitration agreement as a result of the pre-litigation text messages.
   e) Those messages said, as an example, "Thank you for your $70.00 pymt on [account number]. Pymt posted on 08/23/12 03:18p. Terms&Conditions apply." Porter understood that the phrase "Terms&Conditions" was a link through which he could access information of MetroPCS's terms and conditions on his phone. However, Porter never accessed the information because he believed he "had no reason to go there."
   f) Applying basic contract principals to this electronic contract, the Third District determined that the terms of service contained in these text messages sent every month to Porter was conspicuous enough to put a reasonable prudent person on inquiry notice such that he "has no right to shut his eyes or ears to avoid information, and then say that he has no notice."
   g) In so holding, the Court distinguished this case from the browsewrap agreement contained in *Vitacost.com, Inc. v. McCants*, 210 So. 3d 761, 762 (Fla. 4th DCA 2017), where the agreement was not sufficiently conspicuous because the purchaser had to scroll through multiple pages of products before locating the hyperlink at the bottom of a final webpage.

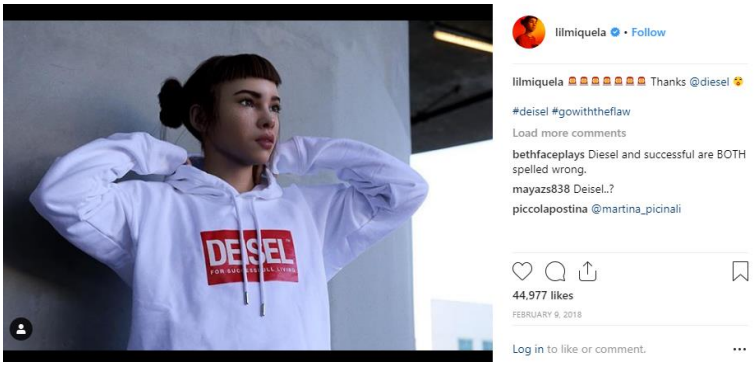
5) The ABA's Standing Committee on Ethics and Professional Responsibility issued formal opinion concerning the need for lawyers to notify clients of data breaches affecting client confidential data.
   a) Formal Opinion 483 (link)
   b) Relates to a lawyer's obligation to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation."
   c) Influenced by data breaches and cyber threats involving or targeting lawyers and law firms, which are a major professional responsibility and liability threat facing the legal profession.
   d) Picks up where Formal Opinion 477R left off (which dealt with a lawyer's ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet).

e) Overall, the Opinion provides general advice for lawyers that is very similar to standard incident response best practices seen across various industries outside of the legal field. Specifically, the Opinion identifies several actions that lawyers must take to address their ethical obligations as they relate to data security and potential security incidents, such as:
   i) maintain at least a basic understanding of changes in the law and its practice;
   ii) prepare an incident response plan;
   iii) implement internal policies and procedures designed to safeguard confidential client information and critical business systems;
   iv) implement tools resigned to monitor technology resources for any unauthorized access or intrusions (including those maintained by external vendors); and
   v) provide appropriate oversight for any lawyers and non-lawyers relating to information technology and information security.
f) Should an incident occur, investigate, contain, and mitigate the incident.
g) There is no comparable ethics opinion or rule in Florida (yet).



6) The FTC requires influencers to disclose a "material connection" (such as a paid product endorsement) between themselves and an advertiser, but how does this apply to CGI influencers who are not real?
   a) Lil Miquela is a 19 year old Instagram model and singer who is dressed by famous fashion brands…. But she's not real. Lil Miquela is an avatar who has amassed 1.5 million followers on Instagram:





   b) Until Lil Miquela's account was attacked by another avatar in April 2018, few people were aware that she wasn't a real human. Her avatar is placed in real photographs with real people.
   c) Questions:
      i) Should FTC disclosure requirements apply to CGI influencers? Should CGI influencers be required to disclose that they are not human? Is it obvious that they are not human or are they blurring the line between real and fake? These are open questions but FTC guidance on the applicability of disclosure requirements in augmented and virtual reality point to disclosure being required.
         (1) "Online ads may contain or consist of audio messages, videos, animated segments, or augmented reality experiences (interactive computer-generated experiences) with claims that require qualification. As with radio and television ads, the disclosure should accompany the claim." https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf
      ii) Can the "product experiences" of an avatar can ever be true so as to meet the FTC's testimonial requirements that endorsements reflect the honest opinions, findings, beliefs, or experience of the endorser? Should the opinion be deemed to be that of the creator of the avatar? These are also open questions.