Florida Bar Business Law Section
Computer Law and Technology Committee
Hot Topics
June 26, 2019 Meeting
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1) **Courts are being inundated with ADA Title III website cases**
   a) *Price v. Escalante – Black Diamond Golf Club LLC*, 2019 WL 1905865 (M.D. Fla. Apr. 29, 2019)
   b) Blind resident sues golf course alleging its website was incompatible with his screen reader in violation of ADA Title 3, 42 USC 12181-12189.
      i) Specifically, the plaintiff alleged the website was inaccessible because he could not: (i) find out about golf lessons; (ii) request membership and learn about the procedure to reserve a golf tee time; (iii) book a "stay and play" package or nightly house rental online; (iv) learn about the monthly happenings at the golf to enjoy a meal there in when spending a day recreating and golfing at the golf club.
      ii) Other than the link to the newsletter, however, the plaintiff did not specifically identify any portions of the website that were inaccessible.
   c) On motion to dismiss, Court granted the motion without prejudice upon concluding that the plaintiff lacked standing to bring his claim for a future injury, and he failed to state a claim that this website was inaccessible.
   d) Court notes there has been an "explosion" of cases under Title III (private entities) and Title II (government entities) alleging that websites violate the ADA.
   e) "This is one of many recent cases in which persons with disabilities have alleged that private entities' websites violate the ADA. The spate of these cases has out paced any regulations from the Department of Justice on what businesses must do to have ADA compliant websites, and courts have reached no consensus. Applying this Circuit's case law in Title III ADA cases, the Court concludes Price failed to adequately plead his standing. But even if he had, the Court concludes Price also failed to state a claim because he has not pleaded facts showing that the Black Diamond website impedes his ability to access and enjoy the golf club. But the Court will grant Price an opportunity to file an amended complaint if he is able to do so."
   f) Court lamented that "while the ADA undoubtedly applies to websites, there is no guidance from the DOJ about what a 'public place of accommodation' must do to make its website ADA compliant."
      i) There is a circuit split on the issue of whether websites by themselves are places of public accommodation, or whether a website must share a nexus with a physical place of public accommodation to trigger Title III's accessibility requirements. The 11th Cir. already has hinted that it falls under the nexus category, but it is expected to squarely address this issue in its review of *Gil v. Winn-Dixie Stores, Inc*., Case No: 17-13467 (argued in Oct. 2018; decision pending).
      ii) "As a review of the above cases shows, courts cannot agree on how to apply traditional Title III case law to website cases. There is disagreement about when a

website impedes access to a physical location, or whether a plaintiff must actually visit a "place of public accommodation" to state a claim after having visited a website. And that is to say nothing of the uneven application of the *Houston* factors in Title III website cases. *Guidance is sorely needed in this arena*."

2) **Biometric privacy legislation is introduced in several jurisdictions, including Florida**
   a) The only states that currently have biometric data laws to regulate the collection and use of biometric information are Illinois, Texas, and Washington. Only Illinois allows for a private right of action.
   b) This year legislators in Florida introduced the "Florida Biometric Information Privacy Act," House Bill 1153 and Senate Bill 1270.
   c) The Florida bill was patterned after Illinois' BIPA.
   d) In March, CLTC issued a technical paper to assist the Legislative Committee liaison in Tallahassee during the session. Technical paper attached.
   e) The initial version included a private right of action. Once our technical paper circulated, the House Bill was amended to remove that language.
   f) The bill eventually stalled but may resurface next year.
   g) New York City also introduced a similar biometric bill this year. Other states that have introduced legislation in recent years include: Alaska, Arizona, Connecticut, Delaware, Massachusetts, Montana, and New Hampshire.
   h) Since the Illinois decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186 (Jan. 25, 2019), there has been a wave of new biometric class actions filed in Illinois and other states applying Illinois law.
      i) In *Rosenbach*, the Illinois Supreme Court held that a plaintiff suing under BIPA need not allege or show actual injury or an adverse effect to maintain an action for damages under the statute.
      ii) The Court reasoned that "[i]t is clear that the legislature intended for this provision to have substantial force" and that "[w]hatever expenses a business might incur to meet the law's requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded." Moreover, the Court concluded that it would be "completely antithetical to the Act's preventative and deterrent purposes" to require a showing of some compensable injury beyond violation of statutory rights.
      iii) BIPA allows for $1,000 or $5,000 in statutory damages per violation, depending on whether the violation was negligent, intentional, or reckless.
      iv) Decision attached.

3) **Law firm struggles to recover money following social engineering (phishing) attack**.
   a) *Deutsche Bank Nat'l Tr. Co. v. Buck*, No. 3:17cv833, 2019 BL 112430, 2019 US Dist Lexis 54774 (E.D. Va. Mar. 29, 2019) (attached)
   b) A hacker caused funds to be misdirected during a real estate transaction, and the funds never made it to Deutsche Bank.
   c) The bank's closing agent communicated with the law firm the payoff instructions.

d) According to the law firm, the hacker gained access to confidential emails and learned about the upcoming wire. The hacker "mimicked" the email address used by the bank's closing agent to send fraudulent wiring instructions, and upon receiving the money from the buyer the law firm wired the money to the hacker's account.
e) By the time the bank's closing agent inquired about the funds (about a month later), the funds were long gone.
f) The bank sued the law firm for negligence and breach of contract, and the law firm counter-sued the closing agent under theories of contribution and equitable indemnification (both derivative claims). The law firm alleged it was the closing agent's acts, not the law firm's, that caused the bank's loss.
g) In its third-party complaint, the law firm alleged that the closing agent "knew or should have known of the hacking that had been taking place in its email . . . and . . . failed to notify and warn its customers (like Deutsche ...) or those with whom it had business (like the [law firm] . . .)."
h) The court identifies the question presented as "whether or how to impose liability on a party whose potentially negligent conduct flows from a data breach."
i) "Although some courts have found that a party may proceed on a negligence claim against an entity who suffered a data breach, others remain reluctant to do so. Because the Buck Parties fail to establish a legal duty Altisource owed to Deutsche under Virginia law, the Court must dismiss both claims. But the Court will grant the Buck Parties leave to file an Amended Third-Party Complaint."
j) The Court applied Virginia law. Not many published cases discussing these issues.

4) **California Consumer Privacy Act updates** (Cal. Civ. Code § 1798.100-1798.198)
   a) There are several amendments pending that may change the CCPA.
      i) One such amendment would have expanded the private right of action to cover privacy practices, while simultaneously removing companies' rights to cure violations before facing a suit.
      ii) On April 29, 2019, that amendment stalled and is considered effectively dead.
   b) There are other amendments that look like they may pass.
      i) Legislators are considering an amendment that would clarify that employees are not "consumers" for purposes of the CCPA.
      ii) Another would tighten the definition of "personal information" and remove information that is merely "capable of being associated" with a particular individual and will exclude "household"-level information.
      iii) Another would exclude from the definition of "de-identified" information that information which is "capable of being associated with" a particular individual.
   c) Florida businesses with a presence in California or who collect personal information belonging to California residents – such as IP addresses – may be impacted by this legislation.