HOT TOPICS IN THE RETAIL AND HOSPITALITY INDUSTRIES

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Technology and the Hospitality and Retail Industries

- Employee Privacy and Tracking
- Customer Privacy and Tracking
- Data Breaches
- Artificial Intelligence
- Robot Technology
- Social Media
- The list could go on and on and on…..

Future of AI

Employee Privacy/Tracking

- Illinois Biometric Privacy Act (740 ILCS 14/1)
  - Series of pending lawsuits against internet/social media companies and employers
  - Improper collection of fingerprint data
  - Baron v. Roundy's Supermarkets, Inc., No. 17-03588 (N.D. Ill. May 11, 2017)
  - How to defend:
    - Standing doctrine requires a concrete/particularized harm, not just a statutory violation (Spokeo v. Robins, 136 S. Ct. 1540 (2016)

- Employee agreed to biometric collection (McCullough v. Smarte Carte, Inc., No. 16-cv-03777 (N.D. Ill. Aug. 1, 2016)
- Notification that an employee's biometric data would be taken is sufficient to defend against a claim even if actual consent was not obtained (Vigil v. Take-Two Interactive Software, Inc., No. 17-303, 2017 U.S. App. LEXIS 23446 (2d. Cir. Nov. 21, 2017)

- Case involving employer tracking of employee cell-phones via GPS.
  - Dicta: past, low-tech examples of tracking such as surveillance footage imply employees GPS tracking is not an invasion of privacy. Haggins v. Verizon New Eng., Inc., 648 F.3d 50 (1st Cir. 2011) (judgment for employer on other procedural grounds)

- Loews Chicago Hotel lawsuits
  - Lawsuit alleging violation of the IBIPA on grounds that it failed to ask for employee's consent while using fingerprints as part of "timekeeping system"
  - One lawsuit alleges that the hotel did not inform employee that it would share biometric data with third parties or how long it would store the information
  - Another lawsuit alleges that the hotel did not inform employees of the purpose or length of time for which the fingerprints would be collected, stored, disseminated and used
- Great America (Six Flags) (fingerprints collected to get in and out of amusement park) (Rosenbach v. Six Flags Entertainment (currently before IL Supreme Court)

Customer privacy

- Illinois Biometric Privacy Act (740 ILCS 14/1):
  - Lawsuits alleging improper collection of facial geometrics through webcams and cell phone cameras. Norberg v. Shutterfly, Inc., No. 1:15-cv-5351 (N.D. Ill.); Martinez et al. v. Snapchat Inc., No. 2:16-cv-05182 (C.D. Cal.); Licata v. Facebook, Inc., Nos. 3:15-cv-03748, 3:15-cv-03749, and 3:15-cv-03747 (N.D. Cal.)
- Google's gathering of data over unencrypted wifi networks including "payload" data such as usernames, passwords, videos, and documents for use in Google Maps app is not illegal under the Federal Wiretapping Act. Joffe v. Google, Inc., 746 F.3d 920 (9th Cir. 2013).

Data Breach Liability

- Whether the data has been used improperly by bad actors may matter. Current circuit split:
  - Attias v. CareFirst, No. 16-710 (D.C. Cir. 2017) (increased likelihood of future harm is sufficient for standing after data breach); Galaria v. Nationwide Mut. Insur. Co. (6th Cir. 2016) (same); In re: Horizon Healthcare Services Inc. Data Breach Litigation (3d Cir. 2017) (same)
  - Whalen v. Michaels Stores (2d Cir. May 2017) (plaintiffs who had not yet suffered fraudulent charges or identity theft following a breach could not sufficiently allege a substantial risk of future injury); Beck v. McDonald (4th Cir. 2017) (same); In re SuperValu Customer Data Security Breach Litigation (8th Cir. 2017) (same)

Use of Robot Tech/AI/Self-Driving Vehicles

- https://www.youtube.com/watch?v=wf1xR2kX3rU&list=RDwf1xR2kX3rU&start_radio=1#t=49
- Federal Automated Vehicles Policy – created by DOT September 2016
- Nilsson v. General Motors, 4:18-cv-00471 (N.D. Cal. 2018) (settled out of court) (self-driving GM Cruise "suddenly veered back" into Plaintiff's lane (motorcyclist), striking him and knocking him to the ground)
- Who is responsible? The operator or the manufacturer:
  - Question of negligence standard or products liability standard (strict liability in some states)
  - Example: Ryan Abbott, The Reasonable Computer: Disrupting the Paradigm of Tort Liability, 86 Geo. Wash. L. Rev. 1 (Jan. 2018).
    - Crane operator accidentally drops box in wrong stop and hits pedestrian = negligence liability of employer
    - Crane malfunctions and accidentally drops box on pedestrian = products liability of manufacturer
- Automated crane improperly calculates location of drop zone and accidentally drops box on pedestrian – this looks similar to both scenarios: which is it? Which should it be?

Third Party Criminal Act

- Virginia adheres to the rule that the owner or occupier of land ordinarily is under no duty to protect an invitee from a third person's criminal act committed while the invitee is upon the premises. Gupton v. Quicke, 247 Va. 362, 363 (1994).
- However, certain "special relationships" may exist between particular plaintiffs and defendants, either as a matter of law or because of the particular factual circumstances in a given case, which may give rise to a duty of care on the part of the defendant to warn and/or protect the plaintiff against the danger of harm from the reasonably foreseeable criminal acts committed by a third person.

- Despite the existence of a special relationship, the business owner does not owe a duty of care to protect its invitee unless it "knows that criminal assaults against persons are occurring, or are about to occur, on the premises which indicate an imminent probability of harm to [its] invitee." Wright v. Webb, 234 Va. 527, 533 (1987).
- Must be "notice of a specific danger just prior to the assault." Id. Knowledge of "previous criminal activity" is insufficient. Id.
- Thus, regardless of whether any "previous criminal activity was sufficient to make the subsequent assault on the plaintiff reasonably foreseeable," the inquiry must be narrowed to whether '"there was an imminent danger of criminal assault' to the plaintiff." Dudas v. Glenwood Golf Club, 261 Va. 133, 140 (2001).

- Agnes Christine Terry, Admin. Of the Estate of Peter Ambrister v. Irish Fleet, Inc., No. 170288 (Va. Sept. 27, 2018)
  - The recognition of a voluntarily assumed duty to warn or protect against the danger of criminal assault by a third person should be confined to express undertaking (not those based on an implied undertaking)

Third Party Criminal Act/Worker's Comp Bar

- In order for Plaintiff's claims to fall within the exclusive jurisdiction of Virginia's worker's compensation system, her injuries must (1) arise out of the employment and (2) occur during the course of the employment.
- "Arising out of" more difficult prong to establish
- "Arising out of the employment" = a causal connection between the conditions under which the work is required to be performed and the resulting injury." Lucas v. Lucas, 212 Va. 561, 563, 186 S.E.2d 63, 64 (1972)
- Assault case - the necessary causal connection may be established if the evidence shows that the attack was directed against the claimant as an employee [or] because of the employment. Rucker v. Wells, 41 Va. Cir. 340, 343 (Richmond City Jan. 31, 1997)