CYBERSECURITY AND DATA PRIVACY LAW

By Shawn E. Tuma

New Data Breach Notification Requirements

Texas law requires a person who conducts business in Texas and collects or stores computerized data that includes sensitive personal information, or SPI, to notify any individual whose electronic SPI was or is reasonably believed to have been acquired by an unauthorized person.[1] Failing to comply with this notification requirement can result in civil penalties of up to $100 per person per day for the delayed time up to a maximum amount of $250,000 per breach.[2]

Effective January 1, 2020, HB 4390 amends this law to require that such notifications be made "without unreasonable delay and in each case not later than the 60th day after the date on which the person determines that the breach occurred" instead of "as quickly as possible."[3] This amendment brings more certainty because it not only adds the specific 60-day timing requirement but also clarifies that the time period begins to run when the determination of *breach* is made, which sometimes only occurs after an investigation into a cyber-related *incident* that may not immediately have been known or reasonably believed to have been a *breach*. HB 4390 also adds the requirement for notifying the Texas attorney general during that same 60-day time period if the breach involves at least 250 Texas residents. The AG notice must include five specific categories of information identified in the statute.[4]

Website Scraping Allegations Sufficient to Invoke Texas and Federal "Hacking" Laws

A website owner whose terms of use agreement prohibited the use of page-scraping and automated tools to access or monitor its website and content adequately stated a claim for violation of the Texas Harmful Access by Computer Act[5] and federal Computer Fraud and Abuse Act[6] against a defendant accused of using such tools to collect data for its website.[7] These laws prohibit accessing a computer without authorization. The agreement established the parameters for the authorization.

Viewing Pictures on Another's Cellphone: Violation of Texas Hacking Law?

A school principal who viewed improper pictures taken of female students on a substitute teacher's cellphone without his consent did not violate Texas' Breach of Computer Security[8] law. It was a valid defense that the principal accessed and looked through the phone for the purpose of giving it to the police for investigation.[9]

Cyber Insurance: Specific Policy Needed to Cover Data Breaches

General liability insurance policies that cover "personal and advertising injury" that includes publication of material "that violates a person's right to privacy" do not apply to assessments imposed by payment card brands for fraud loss from a data breach. "Plaintiff could have sought coverage that would unambiguously include coverage of a data breach but chose not to do so."[10]

The CCPA: A Non-Texas Law Impacting Texas Businesses

While outside of Texas, Texas businesses should pay close attention to the California Consumer Privacy Act, a strong consumer data privacy law that may apply to those doing business in California that collect personal information from individuals in California. The CCPA goes into effect in January 2020.

Notes

1. Tex. Bus. & Com. Code § 521.053(b).
2. Tex. Bus. & Com. Code § 521.151(a-1).
3. Tex. Bus. & Com. Code § 521.053(b).
4. Tex. Bus. & Com. Code § 521.053(b)(i).
5. Tex. Civ. Prac. & Rem. Code § 143.001, et seq.
6. 18 U.S.C. § 1030.
7. *Southwest Airlines Co. v. Roundpipe, LLC*, 375 F. Supp. 3d 687, 706 (N.D. Tex. 2019).
8. Tex. Penal Code § 33.02, et seq.
9. *Ruiz v. State*, 577 S.W.3d 543, 547-48 (Tex. Crim. App. 2019).
10. *Landry's, Inc. v. Ins. Co. of Penn.*, 2019 WL 3080917 (S.D. Tex. May 22, 2019).

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ENERGY LAW

By Brian C. Boyle

Despite growing financial challenges for shale drillers, Texas maintained its unprecedented level of oil and gas production in 2019. Given the thriving market, it's no surprise that Texas courts continued to resolve important issues in the energy space over the past year.

Revisiting the overarching question addressed in its 2016 *Hyder* opinion, the Texas Supreme Court made clear that when it comes to calculating royalties, the specific language of the written agreement controls. In *Burlington Resources Oil & Gas Company LP v. Texas Crude Energy, LLC*, the Texas Supreme Court held that post-production costs could be deducted from an overriding royalty interest where the agreement stated that the royalty interest "shall be delivered … into the pipelines, tanks or other receptacles with which the wells may be connected."[1] Even though the agreement also called for payment of the royalty based on the "amount