CAIIA

Status Report

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September 2020

A Preservation of Evidence Letter is Not Enough to Protect an Attorney or Their Client From Consequences for Spoliation of Evidence

Credit to Tyson & Mendes, La Jolla, CA

A person or entity has an obligation before litigation is filed to preserve all relevant evidence if they know or reasonably should know that they will be sued. Although most large corporate entities are aware of such obligations a small business owner or individual may not. If the client and attorney have conducted a reasonable and diligent search of all relevant evidence in the hands of their client early on, they can eliminate or at least minimize sanctions that may be imposed should opposing counsel establish spoliation of evidence. If the client's conduct impacted potential evidence before counsel was retained, the attorney needs to know this at the outset, because it may impact the defense of the case. Prudent counsel should start educating their client and managing expectations upon discovery of a potential spoliation issue.

As defined in *Williams v. Russ* (2008) 167 Cal.app.4th 1215, "spoliation of evidence" is the destruction or significant alteration of evidence, or the failure to preserve evidence for another's use in pending or future litigation." This conduct is condemned because it can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action, and can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both. (*Williams*, *supra,* 167 Cal.App.4th at p. 820.)

Although there is no tort cause of action for negligent or intentional spoliation of evidence, it is considered an abuse of the discovery process and is sanctionable and subject to a broad range of punishment, including monetary, issue, evidentiary, and terminating sanctions. (Civ. Pro §§ 2023.010(d), 2023.030 (a-d). (*Cedar-Sinai Med. Ctr v. Superior Court* (1998) 18 Cal.4th 1, 12; *Williams*, *supra*, 167 Cal.App.4th, at p. 820)

The sanction(s) imposed must be tailored by the Court to the situation at hand. Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct. (*Williams, supra*, 167 Cal.App.4th, at p. 1224, citing *McGiny v. Superior Court* (1994) 26 Cal.App.4th 204, 210-212)

Insurance defense litigation attorneys typically have no control over the preservation of evidence until they are retained. They customarily send out a preservation of evidence letter upon receipt of the file, but they have an affirmative obligation to do more. This obligation to preserve evidence becomes more difficult as technology continues to advance. Even the simplest case can involve evidence storred on and generated by technology – cell phones, emails, texts, Facebook, iPads, Instagram, laptops, blogs, company websites, Twitter, etc. Insurance defense attorneys need to identify all sources of potential evidence, and take reasonable measures to collect it. Relying on a technologically-challenged client to identify all the emails with limited search terms is potentially not a reasonable and diligent search. A competent and diligent attorney needs to understand how their client retains documents. They need to identify custodians, identify physical files and locations, identify all the technological sources, account for archiving, lost equipment, storage facilities, the impact of technology crashes and the logistics of upgrades in equipment. Working with large corporations can provide an opportunity to develop search terms with their IT department and a plan to ensure a reasonable and diligent search. One can also instruct them to issue a litigation hold and evaluate any prior litigation holds issued by the company. For the individual or small business client counsel may consider having an IT vendor remotely access appropriate email accounts, to pursue agreed search terms. Continued on page 4

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Presidents Message – September 2020

John Ratto
CAIIA President

The long and winding road…..This will be my last message to you as President of this wonderful organization.

While Paul Camacho and I expected to each serve a one-year term, our time was extended a bit longer. It has been a pleasure serving in this leadership role for an organization that I believe is more relevant than ever. While our membership has dwindled over the years, primarily as a result of larger IA firms replacing smaller independent firms (the backbone of our organization), there will always be a need for an organization like ours, dedicated to upholding the standards of adjusting and educating both new adjusters and veterans alike. I firmly believe that the CAIIA will continue its efforts to fulfil its role as an educator and as a standard bearer to all claims professionals.

As I have mentioned in my previous monthly messages, I truly believe that you cannot completely replace adjusting with technology. While we have seen the increasing use of technology over the last several years (well really the last 25 years since Xactimate's introduction in the early/mid 1990's), it will never replace the need for and results produced by good old-fashioned legwork. Despite the amazing ability of 3D imaging systems to scan the interior of a home/business, these systems cannot truly assess things like pre-existing damages, potential fraud issues (reading the body language of an insured/claimant) and basically capture the loss as a whole.

Too many times I have seen carriers try to cut costs by remotely adjusting losses, only to spend more time/money in the end because issues always arise that are best handled by a trained adjuster. "Your company did not see the manifold for the radiant heat system hidden in the closet next to the garage" or, "I had Quartz countertop not Granite"….

Even if these more obvious issues do not arise, I have often seen remotely adjusted claims go to appraisal which could have easily been avoided simply by having a field inspection performed by a trained adjuster at the onset of the claim/loss. Which brings up another value of the field adjuster – the ability to get on top of the claim and get on site to examine the loss promptly. I have always been an advocate of the "drop whatever you're doing and inspect the loss" approach. In my mind there is nothing more important than controlling the loss from the onset, whether it be a liability or a property claim. For example, a "slip and fall" at the grocery store where an adjuster promptly captured and memorialized the loss will be in a better position in the months and years down the line if that case should ever go to litigation. For a property adjuster there is nothing more important than trying to control the loss from the beginning, including managing costs the emergency services, as well as the expectations and cooperation of the insured. Simply sitting behind a phone/computer screen and gathering facts can never replace the field adjuster.

Although I will be stepping down as president in early October, I will make it my mission to continue to support the efforts of the independent educated and experienced adjuster and our industry as a whole. Thank you for allowing me this opportunity to serve as your president and will faithfully remain a member of this longstanding organization.

On October 9th, we will be holding our annual fall meeting and swearing in our new CAIIA president Mr. Richard Kern of the firm Schifrin, Gagnon, and Dickey. In the next couple of weeks we will be sending out an email to all of our members providing details on how to login in order to attend our virtual meeting held on that date. Hope to see you then.

With much appreciation, John

CAIIA Fall Meeting
October 9th

Login details coming soon to your inbox!

Press Release from the Insurance Commissioner:

East Bay woman pleads guilty to workers' compensation insurance fraud and identity theft

SAN RAFAEL, Calif. — Marlene Cavalcanti, 40, pleaded guilty to two felony counts of insurance fraud and identity theft after falsifying documents to receive an additional $10,590 on her workers' compensation claim.

Cavalcanti, employed as an executive assistant, reportedly fell at work and sustained injuries. As a result of her subsequent workers' compensation claim, Cavalcanti received more than $42,000 in total temporary disability payments in addition to her medical treatment. An investigation by the Department of Insurance revealed after being placed on disability, Cavalcanti ceased medical treatment and began working for another company. During this time, she submitted multiple fictitious doctors reports in an attempt to continue to receive disability payments from the workers' compensation insurance company. When confronted by detectives, Cavalcanti ultimately admitted to the fraudulent documents and forged doctors' signatures.

"Every dollar paid on a fraudulent insurance claim increases the cost to California consumers who are forced to pay higher premiums to make up for the loss to insurers," said Insurance Commissioner Ricardo Lara. "We remain committed to finding and fighting fraud during this pandemic. Our ongoing work with our district attorney partners will help ensure that Californians are protected from those who cheat the system."

During the investigation, department detectives discovered Cavalcanti attempted to file a new workers' compensation claim at a different insurance company with her new employer. The new workers' compensation claim dates and injuries were similar and overlapped with her initial claim. The investigation by detectives prevented payment on this subsequent fraudulent claim and the insurance company incurred no loss.

"The Marin County District Attorney's Office will continue to partner with the California Department of Insurance to investigate and prosecute workers' compensation fraud in every form. Whether it is claimant fraud as in the case of Ms. Cavalcanti, which drive up premiums for employers, or businesses who seek to gain an unfair advantage by underinsuring their employees, workers' compensation fraud remains a priority for our office," said Deputy District Attorney Sean Kensinger.

Cavalcanti is expected back in court September 9, 2020 for sentencing. The Marin County District Attorney's Office prosecuted this case.

Sunday,September 13th is Grandparents Day!

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Takeaway

Failure to conduct a reasonable and diligent search of relevant evidence at the outset of an attorneys involvement in case can negatively impact strength of the case, limit discovery opportunities, and subject the client to a spoliation of evidence claim, which can be raised by the opposing at various points during litigation, including trial. (CACI 204) In addition, an attorney can be subjected to disciplinary proceedings imposed by the California State Bar. (Business & Professions Code § 6106; *Cedar-Sinai Med. Ctr v. Superior Court* (1998) 18 Cal.4th 1, 12-13). In the worst situations, there are potential criminal penalties for spoiling or deleting evidence that is relevant to a lawsuit. (Penal Code § 135.)

The collection of relevant evidence from a client requires an understanding of the client's resources, business operations, and technological sophistication. Performing this investigation at the outset can critical to the success of a case and should be part of an attorney's initial investigation and handling activities.

My Off-leash Dog Injured Someone in an Off-leash Park. Can I Be Liable?
Credit to Tyson & Mendes, La Jolla, CA

While many people consider dogs "man's best friend," sometimes man's best friend causes an injury to a human, for which the dog's owner is responsible. A very common personal injury lawsuit is for an injury from a dog bite. Other types of cases involve injuries caused by a dog simply being active and getting a little too rambunctious with someone. Many parks allow dogs to be "off-leash," but a greater responsibility is often placed on the owner as a result.

The Court of Appeal of the State of California, First Appellate District, Division Four recently considered a case in which a dog owner defendant won summary judgment against a plaintiff injured by the defendant's dog, by asserting the plaintiff assumed a risk by being present in an approved off-leash area of a park. The case is *Diane Wolf v. Alexander Webber* (A157939 Contra Costa County Super. Ct. No. MSC1701683), and the appellate court issued a ruling on July 17, 2020, overturning the grant of summary judgment to defendant.

Tilden Regional Park, part of the East Bay Regional Park District, allows dogs to be off-leash in a certain section of the park, pursuant to East Bay Regional Park District Ordinance 38, section 801.3. The owners must keep their dogs under control. On October 6, 2016, plaintiff Wolf was in the off-leash section of the park with an off-leash dog, Maury. Defendant was also in this section of the park with his off-leash dog, Luigi. Both parties were walking the same trail, initially 70 feet apart. Unbeknownst to defendant, Luigi wandered away and came close to plaintiff and Maury. Defendant discovered this when plaintiff began to yell she was afraid. Defendant then tried to call Luigi back several times. Luigi did not comply, and the dogs purportedly tumbled over each other and collided with plaintiff. Plaintiff dislocated her ankle and broke two bones in her leg. During an interview with a Park District police offer, defendant admitted Luigi was not under perfect control, that Luigi should have been under his control, and that was Luigi was still being trained. Plaintiff sued defendant for negligence and negligence per se, alleging defendant breach his duty of care by failing to leash or otherwise control Luigi in order to ensure the dog's safe and proper behavior on the trail.

Defendant moved for summary judgment with an argument that the primary assumption of risk doctrine applied to off-leash hiking trails and that plaintiff assumed the inherent risk of "being bumped by a dog running back to its owner or tumbling over another dog" by hiking on the trail. The trial court agreed with this argument, while the appellate court disagreed and reversed summary judgment.

To succeed on a claim of negligence, a plaintiff must show the defendant owned a legal duty of care, among other elements. (*Merrill v.* Navegar, *Inc.* (2001) 26 Cal.4th 456, 477.) A person typically owes a duty of care not to cause an unreasonable risk of harm to others. (Civ. Code § 1714, subd. (a).) The primary assumption of risk doctrine creates an exception to this rule. Because some activities are inherently dangerous, "[i]mposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation," and therefore a duty does not exist. (Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990, 1003.) Recovery for injuries caused by risk *not* inherent in such an activity is not barred by the primary assumption of risk doctrine. (*Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 538.)

The Court looked to the provisions of the rules for the "Leash Optional Areas" to determine the risks inherent in walking in this section of the park. Section 801.3 provides: "A dog may run at large under the control of its owner…provided, however, that the owner or handler shall have a leash for each dog in his/her possession and keep the dog *under control at all times*….[A] dog is considered under control *when the owner or handler is aware of its conduct and when it returns to the owner or handler when called*…Dogs are presumed to not be under control when:…*They physically harm people directly or indirectly by their actions…They touch or jump on other park users who have not invited or engaged in interaction with the dog."* Defendant and his dog ran afoul of several of these rules, as defendant was unaware of the location of Luigi, Luigi did not return when called, harmed a person, and touched another park user who did not did not engage with Luigi. Accordingly, the Court concluded that being knocked over by an unleashed dog with which a person has sought no interaction is not an inherent risk of walking in that portion of Tilden Park.

While the Court did not adjudicate if defendant was actually liable to plaintiff for the injuries caused by Luigi because the Court merely reversed defendant's grant of summary judgment and sent the case back to the trial court, the Court did an answer the question that yes, one can potentially be liable for damages resulting from this type of incident.

"Medical Necessity" Criteria and Inconsistent Expert Testimony Mandate Reversal of Genuine Dispute Summary Judgment

Credit to Haight, Brown & Bonesteel. Los Angeles, CA

In *Ghazarian v. Magellan Health* (No. G057113, filed 8/7/20), a California appeals court reversed summary judgment that had been granted for a health plan insurer in a bad faith and unfair business practices lawsuit on the genuine dispute doctrine where there was evidence that the standards of "medical necessity" adopted by the insurer did not meet proper criteria, and its supporting expert's opinion was inconsistent with the insurer's stated ground for denying coverage.

In *Ghazarian*, an autistic youth was receiving applied behavior analysis (ABA) therapy under a health insurance policy with Blue Shield, as administered by Magellan Health. By law, the policy had to provide all medically necessary ABA therapy. (Health & Saf. Code, § 1374.73 (a)(1; (c)(1).) He was approved for 157 hours of ABA therapy per month but after he turned seven, his parents' request for 157 hours was denied on grounds only 81 hours per month were medically necessary. In an independent medical review by the Department of Managed Health Care, two of the three independent physician reviewers disagreed with the denial, while the other agreed. As a result, the Department ordered Blue Shield to reverse the denial.

The parents sued Blue Shield and the administrators for bad faith and unfair business practices, alleging that they adopted unfair medical necessity guidelines that reduced the amount of therapy autistic children receive once they turn seven years old, regardless of medical need. The trial court granted summary judgment for the defendants, ruling that the fact that the third IMR doctor had agreed with Blue Shield demonstrated a genuine dispute, negating bad faith as a matter of law. But the appeals court reversed, finding triable issues of fact.

The claim administrator had adopted guidelines stating that "[ABA] Services may range from 21 to 40 hours per week, early in the recipient's development (for example, under the age of 7). . . . The standard of care for comprehensive services has been for durations of 1 to 2 years." But the parents argued that these guidelines conflicted with established medical standards set forth by the Behavior Analyst Certification Board (BACB), which is specifically mentioned in the statutory ABA scheme as a recognized ABA credentialing entity. The BACB standards state, "[ABA] treatment should be based on the clinical needs of the individual and not constrained by age. . . . ABA is effective across the life span. Research has not established an age limit beyond which ABA is ineffective."

The *Ghazarian* court stated that "bad faith may also be found where an insurer 'employs a standard of medical necessity significantly at variance with the medical standards of the community . . . . Such a restricted definition of medical necessity, frustrating the justified expectations of the insured, is inconsistent with the liberal construction of policy language required by the duty of good faith. . . . [G]ood faith demands a construction of medical necessity consistent with community medical standards that will minimize the patient's uncertainty of coverage in accepting his physician's recommended treatment.'" (Quoting *Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 845-846.)

The *Ghazarian* court went on: "To be clear, we do not mean to suggest that a health insurer cannot define medical necessity in a manner that embraces efficient practices or novel technologies or procedures that have support in the medical community. That is not the case here. Blue Shield provides no explanation or evidence in support of the reasonableness of the medical necessity guidelines at issue. It is entirely unclear why Blue Shield's standards advise that comprehensive ABA therapy should be limited to children under the age of seven."

Discussing the genuine dispute rule, the *Ghazarian* court pointed out that "Although one physician on the IMR panel arrived at the same conclusion as Blue Shield, that physician did not apply or evaluate Blue Shield's medical necessity criteria." The court stated: "Blue Shield arbitrarily reduces ABA treatment for autistic children after they turn seven years old. Based on this criteria, Blue Shield reduced A.G.'s treatment from 157 hours to 81 hours per month after he turned seven without regard for his actual medical needs. It then cited A.G.'s significant progress—progress the expert it now wishes to rely on said did not exist—as a pretextual reason for this reduction. . . . Blue Shield's stated reason for reducing A.G.'s treatment was at odds with the concurring physician on the IMR panel. Defendants explained reduced treatment was warranted because A.G. had already significantly improved with ABA therapy. In contrast, the physician on the IMR panel found less treatment was appropriate because A.G. had only shown limited improvement with ABA therapy, indicating it had only been minimally effective. The stark differences between these evaluations raise questions as to whether Blue Shield thoroughly and fairly evaluated plaintiffs' claim."

Besides the inconsistency between Blue Shield's stated reason for denying coverage and the IMR doctor's justification, the *Ghazarian* court noted other indicia of bad faith, including a declaration from another insured who had been denied ABA treatment on similar grounds, evidence of a pattern and practice and evidence that the claim administrator had pressured the autism service provider into adopting its standards by threatening to terminate its provider agreement.

Finally, the *Ghazarian* court stated that "Since plaintiffs' bad faith claim against Blue Shield survives summary judgment, its UCL claim against Blue Shield must too."

Risks and Rewards of Digital Contact Tracing

Credit to Tyson & Mendes, La Jolla, CA

Analogizing George Orwell's *1984*, current conditions in the United States and the State of California during the COVID-19 pandemic may not be much of a stretch. In *1984*, Orwell depicted a future one could hardly conceive, where the government controlled individuals' freedoms through surveillance. This new world of masked neighbors, empty grocery store shelves, vacant offices, stay-at-home orders, limitations on travel and the inability to visit with family and friends would have been as inconceivable in 2019 as living in Orwells' Oceania remains today.

Presently, efforts are underway to restore normalcy and pre-COVID-19 freedoms by implementing effective policies, developing vaccines and discovering medications to stem the flood of cases. One of the frequently-discussed policies for advocated is contract tracing. Contact tracing refers to the process of identifying and monitoring individuals who have, or may have, come into contact with an infected individual, in order to control contagion.

The Proposal

Historically, contact tracing has been performed manually, through interviewing infected individuals and notifying the infected person's contacts so they can be tested and/or self-quarantine. California's current contact tracing plan, "California Connected" relies on manual contact tracing methods. Technology companies are racing to develop and market more effective methods for contact tracing.

Google and Apple announced a joint project to provide digital contact tracing (DCT) through Bluetooth technology. Digital contract tracing uses smartphones to notify individuals who have been in close proximity to an individual diagnosed with COVID-19 of their potential exposure. Digital contact tracing is also intended to improve manual contact tracing by alleviating the problem of insufficient contact tracers and the hours of labor required to perform the work,[4] increasing the speed of identifying and notifying potential contacts and avoiding reliance solely on the infected individuals' memory of who he or she came into contact with.

The proposed technology would allow users to install an app created and updated by public health authorities. The process relies on the voluntary participation of users. Users are able to turn the app off. Once users opt-in, their devices will use Bluetooth technology to periodically emit a "beacon." Each user's phone will both emit beacons and record beacons from other phones nearby. If an individual tests positive for COVID-19, they can report that information in the app. Once a day, the technology will create a list of all the beacons associated with an individual who has tested positive for COVID-19. Each user's phone will check the list of beacons associated with an individual who has tested positive and, if there is a match between the user's beacon and the beacons for the infected individual, the user will be notified. The system will not disclose the identify of the person who tested positive, but will advise the user of the day the contact occurred, how long the contact lasted, and will provide information on the Bluetooth signal strength (higher signal strength indicates closer proximity).

The Paradox

The United States is a republic founded on the ideals of liberal democracy which valuate individual rights and freedoms. Proponents of contact tracing assert that it is one of the most effective methods for controlling COVID-19, or any, pandemic. Controlling the pandemic is necessary to restore individuals' autonomy and improve economic conditions. Paradoxically, the advice of experts is that the best way to increase freedom is to take action which infringes upon freedom.

The Pros

There is evidence supporting the effectiveness of digital contact tracing in combination with other mitigation measures. Possibly one of the most notable examples of the success of digital contact tracing is South Korea. South Korea has the dubious benefit of prior experience combating large-scale epidemics in connection with a MERS outbreak in 2015. In the fight against COVID-19, South Korea rapidly responded with a program of aggressive contact tracing using GPS information, credit card data and surveillance camera footage. South Korea's methods appear to be working; the nation has reported only 641 cases in the past 14 days.

Another successful example of digital contact tracing when combined with other methods is New Zealand. New Zealand implemented the NZ COVID Tracer App which allows users to voluntarily download an app and create a digital diary of the places they visit. New Zealand also established a system of contact tracing designed to have a minimum of eighty percent effectiveness at notifying individual's close contacts of potential exposure within 48 hours.

The Problems and Potential Pitfalls

Digital contact tracing can be an effective tool in combating COVID-19, but it is not without risk. Furthermore, it is questionable whether the models utilized in smaller countries with different political philosophies would be embraced or accepted within the United States.

<u>Questionable Basis for Authority</u>

One of the threshold issues with contract tracing is whether there is any precedent for compelling citizens to participate in contact tracing, either with or without their knowledge or consent.

California's Constitution declares "All people are by nature free and independent and have inalienable rights," including privacy. Similarly, Federal law guarantees personal freedoms under the 5th and 14th Amendments. Competing with individuals' rights to privacy is the interest of governmental entities in acting to protect those individuals during times of crisis.

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On March 4, 2020, Governor Gavin Newsom declared a state of emergency for California. This was followed by a declaration of a national emergency by President Donald Trump on March 13, 2020. A series of executive orders were issued in the wake of these declarations. Since March 4, 2020, Governor Newsom has signed forty executive orders relating to the state's response to COVID-19. At the federal level, President Trump has signed nine executive orders since declaring a national emergency. The limitations on the use of and the legal authority supporting executive orders is open to debate. Governor Newsom's executive orders ostensibly derive their authority from the State Constitution and California Government Code §8558, which identifies the conditions under which the governor can declare a state of emergency. The list explicitly includes epidemics. The authority for executive orders issued by the President are based upon the United States Constitution and the precedent for using them dates back to George Washington.

The use of executive orders is not without limitation, however. For example, Governor Newsom's recent use of executive orders has been challenged on the basis that his actions usurp the power of the California legislature. Further, executive orders cannot violate the Federal or California Constitution.

Lack of Effectiveness without Widespread Participation

Allowing participation in digital contact tracing to proceed on a voluntary basis, rather than a compelled basis, would alleviate questions of whether or not California or the United States could compel citizens to comply.

This presents a further challenge because for maximum effectiveness, fifty to seventy percent of the population needs to consent to digital contract tracing. If an insufficient number of users download the app, the program will be ineffective. Users must not only download the app, but leave it on and engaged. Otherwise, one user with the app activated who may be infected may come into proximity with another user with the app which is not activated. In this scenario, the user whose app was inactive may not be warned of a potential contact and exposure.

There are individuals in the State of California who continue to refuse to wear masks. Similarly, some individuals are reluctant to respond to questions continued through manual contact tracing. This, in combination with the potential lack of legal authority to compel compliance, calls into question whether sufficient numbers of citizens in California would voluntarily participate in digital contact tracing to make it effective.

Security Threats and Liability

Assuming citizens voluntarily comply with digital contact tracing in numbers significant enough to have an impact still leaves the question of potential liability relating to the storage and potential misuse of user's personal information. Maintenance of the security of the data may be one of the biggest challenges in launching effective digital contact tracing.

Contact tracing necessarily includes location data. Digital location data contains personally identifying information which can be impossible to remove. Use of that data in connection with other available data, can allow particular individuals using digital contact tracing apps to be identified.

Even in South Korea, where digital contract tracing has been a success, it has not come without cost. While the technology does not disclose identities of individuals, it can disclose routes of travel, age, gender, neighborhood of residence and the names of businesses or residential complexes where the patient traveled. On several occasions, enough information was provided to make identification of infected individuals possible. These individuals faced harassment and social stigmatization. Businesses visited by COVID-19 patients sometimes also suffer.[

In Qatar, where participation in contact tracing was mandatory, a vulnerability in EHTERAZ, its digital contact tracing app, was identified. The flaw exposed the technology to malicious attack and could have released names, addresses, location and health information for all uses. Preventing unauthorized disclosure of data is of particular concern if an individual's data is stored by the United States or one of its agencies. The Privacy Act of 1974 provides a cause of action and liability for actual damages sustained if the government releases such information in an authorized way. However, the statute includes a codified exception to the effect that disclosure is permitted "to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual" if notice is provided to the person whose information is disclosed.

The Prognosis

Digital contact tracing may be an effective tool in the fight against COVID-19. Use of digital contact tracing poses risks for individual users (security of personal information), designers of the software systems (liability for data breaches or vulnerabilities) and governmental entities and agencies that use the data (liability for data breaches or vulnerabilities as well as misuse of the information). Employers, businesses and governmental entities should stay abreast of developments in this area and consult counsel for advice on how best to craft effective risk mitigation procedures.