8:00 a.m. – 8:45 a.m.
REGISTRATION AND CONTINENTAL BREAKFAST
Sponsored by Gold Sponsors:
Stafford Rosenbaum LLP, Michael Best & Friedrich LLP, Gierke Frank Noorlander LLC, and Lindner & Marsack, S.C.

ROOM - A

8:45 a.m. – 8:55 a.m.
WELCOME AND OPENING REMARKS
Amy Ruhig, Attorney, Goodwill Industries of Southeastern Wisconsin, Inc.,
President, Association of Corporate Counsel Wisconsin

9:00 a.m. – 9:50 a.m.

ROOM - B
Beyond the Rules:
Leveraging the New Federal Discovery Rules to Curtail Discovery Cost and Expedite Resolution.
In business, ignorance is not bliss. Similarly, establishing your understanding of the practical implications of the new Federal discovery rules should not be saved for a rainy day. Join Susan Schellinger, Litigation Shareholder at Davis & Kuelthau, S.C. and an in-house counsel guest for a roundtable discussion highlighting the major changes and addressing implementable cost-saving strategies for discovery as well as the opportunity to expedite resolution faster than ever before. The new rules allow and require discovery to be right-sized to the case. Every stone does not need to be overturned. Nor must every shred of paper and every byte of data be kept. Whether facing litigation or needing to ensure compliance with document retention rules, this session will equip you with the tools needed.

Presented by: Susan Schellinger, Litigation Shareholder, Davis & Kuelthau, S.C.;
Sherry Coley, Senior Counsel, Davis & Kuelthau, S.C.; Ryan Murphy, General Counsel, Edgerton Construction

ROOM - A
The DOL's Proposed Changes to the White Collar Overtime Regulations and the Ongoing Attack on Independent Contractor Misclassification.
On June 30, 2015, the U.S. Department of Labor (DOL) Wage & Hour Division proposed sweeping changes to the regulations that govern the white collar overtime exemptions. Some reports estimate an additional five million employees will be eligible for overtime as a result of the rule. According to the DOL, these proposed changes to the Fair Labor Standards Act's white collar overtime exemption regulations will result in a $1.1-$1.2 billion per-year transfer of income from employers to employees. We expect the final regulations to be implemented this summer, with an effective date 60 days later. Our presentation will cover topics such as when compliance with the final regulations will likely be required, the substantive changes in the exemption
standards proposed by the DOL, and practical considerations and tools for addressing these anticipated changes. We will also discuss the DOL’s continued attack against the use of independent contractors, discussing topics such as the DOL’s current position on independent contracting, the various tests for independent contractor status, and avoiding the “red flag” practices.


9:50 a.m. – 10:00 a.m.
BREAK IN EXHIBIT HALL

All breaks throughout the conference are sponsored by Gold Sponsors: Hanson Reynolds Dickinson Crueger LLC, Walker Morris LLP, and DeWitt Ross & Stevens, S.C.

10:00 a.m. – 10:50 a.m.
ROOM - C

Consumer Class Actions.
This panel discussion will cover the following in the area of consumer class actions:

• Arbitration Clause: Update on the current state of the law regarding the enforceability of arbitration clauses in the consumer product context, and the plaintiff bar’s plan to challenge the US Supreme Court precedent regarding enforceability of arbitration clauses when a consumer purchases a product, takes it home, and is required to register the product online and agree to an arbitration clause in order make the product work.

• Standing and Statutory Damages: Summary of the Article III standing issue under review by the US Supreme Court in Spokeo, Inc. v. Robins and the potential impacts of the Court’s decision on consumers’ ability to bring class actions under various consumer protection statutes with statutory damages.

• Labeling and Marketing / Targets for Class Actions: Discussion of targeted marketing and labeling terms that have resulted in actual or threatened liability for false or misleading advertising, and practical advice about how to manage potential risks in an increasingly complex marketing environment with food, beverage, supplements, and other consumer products.

Presented by: Sarah Crooks, Chair, Class Action Defense Group, Perkins Coie LLP; Jeanne Cullen, Partner, Perkins Coie LLP; Sally L. Davis, Corporate Counsel, S. C. Johnson & Son, Inc.

ROOM - B

Generations at Work, Managing the Clash.
Every generation has expressed concern over the younger generation entering the workforce. However, as the retirement age seems to continue to increase, we are seeing multiple generations in the same workplace. Combining baby boomers, Generation X, Generation Y, and the Me Generation creates interesting and challenging situations. The newest breed of applicants can best be described as “introverted exhibitionists” who sometimes relate better to machines than humans. Joel will discuss these growing trends and help you walk away with the following:

• An understanding of what makes the newest generation tick and how to incorporate them into an aging workplace.
• Tips to develop policies regarding dress codes, including polices requiring covering of tattoos, piercings, etc.
• Guidelines for permissible and impermissible use of social media in hiring and discipline.
• Use of flexible scheduling to accommodate the new workforce.
• Practical advice based on real cases.

Presented by: Joel Aziere, President, Buelow Vetter Buikema Olson & Vliet, LLC; Suzanne Glisch, Buelow Vetter Buikema Olson & Vliet, LLC; Michael Moore, Moore’s Law, Legal Coach and former General Counsel, Koss
ROOM - A

Top 10 Real Estate Documents In-House Counsel Will Be Asked to Review and What You Should Know.

Law departments are continuing to evolve to meet more strategically and efficiently the needs of their businesses, including their real estate needs. Every business has a significant real estate component, whether it is owned or leased corporate headquarters, manufacturing, warehouse or distribution facilities, satellite office space, or vacant land owned by the company. Come learn about the Top 10 Real Estate Documents that In-House Counsel are frequently asked to review.

Presented by: Matthew Impola, Senior Counsel, Foley & Lardner LLP; Sarah Slack, Senior Counsel, Foley & Lardner LLP; John Booher, Senior Manager - Environmental Standards, Kohl's Department Stores, Inc.

10:50 a.m. – 11:00 a.m.
BREAK IN EXHIBIT HALL

All breaks throughout the conference are sponsored by Gold Sponsors: Hanson Reynolds Dickinson Crueger LLC, Walker Morris LLP, and DeWitt Ross & Stevens, S.C.

11:00 a.m. – 11:50 a.m.
ROOM - A

Corporate Venturing: Investing in Innovation.

Join us for a discussion of the latest trends in corporate venturing, including the risks and rewards of innovation. Presenters will also share various strategies and alternative approaches to corporate venturing, as well as different legal structures that can be used by corporations interested in the potential to change an industry—or the world.

Presented by: Jack Cook, Partner, Quarles & Brady LLP; Ryan Van Den Elzen, Partner, Quarles & Brady LLP; Joseph Kirgues, Co-Founder, Gener8tor

ROOM - B

Has the US-EU Ship Run Aground?
Keeping Data Secure Now That There Is No Longer a Safe Harbor.

Six months on from the decision that Safe Harbor is invalid, both sides of the Atlantic await the approval of its replacement, the Privacy Shield. We will discuss the latest developments in transatlantic data protection relations and consider the future of EU-US transfers of data.

US organizations that complied with the Safe Harbor provisions were deemed to provide adequate protection for transatlantic data transfers, but this is no longer the case. So what do organizations now need to do to ensure that transatlantic data transfers are secure?

We will be considering the obligations on US organizations under the Privacy Shield, how UK businesses deal with data security challenges, and what organizations need to do to protect their business and both their and their customers' data.

Presented by: Andrew Northage, Partner, Walker Morris LLP; Timothy Liddiard, Senior Staff Attorney-Labor Relations, Kohler Company

ROOM - C

Stop in the Name of Fair Competition: Obtaining and Opposing Emergency Relief in Business Litigation.

Some business crises do not fit within the normal timetable for litigation: theft of trade secrets and confidential information, and interference with critical customer relationships. These and other disputes can often be resolved at the beginning of the case through injunctions. This presentation addresses how to navigate the difficult but often rewarding route to obtaining emergency relief.

Presented by: David Sisson, Shareholder, Reinhart Boerner Van Deuren, S.C.; Jack G. Pawley, Senior Staff Attorney-Labor Relations, Kohler Company
MAIN BALLROOM

12:00 p.m. – 1:00 p.m.
LUNCH & ANNUAL MEETING

Join us for the Annual Meeting of ACC Wisconsin Members.
Recognition of the ACC Wisconsin Law School and Entrepreneurial Clinic Scholarship Award Winners, and Door Prizes.

1:00 p.m. – 2:15 p.m.

KEYNOTE SPEAKER

MANAGING CHANGE WITH MIRTH - MARK MAYFIELD “THE CORPORATE COMEDIAN”

A humorous approach to the very serious topic of managing change. Change is hard but maybe not quite so hard if we approach it with a good sense of humor. Comedian Mark Mayfield will deliver an upbeat, fast paced program that will explain change theory, provide change management skills and tools along with exercises that will leave you laughing. Don't like to laugh? Mark will address that too, as he demonstrates the value of a good sense of humor and how to improve yours in this outrageously funny, yet very practical program.

Known as “The Corporate Comedian,” Mark Mayfield has merged together his corporate background as a lobbyist and his comedy background as a nightclub performer to create a unique and comedic presentation style. He has received rave reviews, having shared the stage with a wide variety of celebrities like Paul Newman, Peter Frampton, Colin Powell, and Bob Newhart. Mayfield is the author of the popular book *Mom's Rules*, a comedic yet poignant look at those things Mom said to us as kids. He has received two degrees magna cum laude from Kansas State University.

Sponsored by Platinum Sponsors: Boyle Fredrickson S.C., Quarles & Brady LLP and Whyte Hirschboeck Dudek S.C.

2:30 p.m. – 3:20 p.m.

ROOM - B

Drafting Effective Staffing Agreements to Limit the Risks of Hiring Temporary Workers.

More and more, employers are turning to temporary and contingent workers to meet their staffing needs. Several recent legal developments require employers to more closely review the risks of onboarding temporary workers. As the law covering the relationship between companies and their nontraditional workforces continues to change, it is important for in-house counsel to know how best to protect company interests and limit legal risks. This presentation will provide guidance for employers on issues related to the hiring of temporary workers, maintaining a workforce that includes temporary workers, and joint employer status under the National Labor Relations Act, the Fair Labor Standards Act, OSHA, and the Affordable Care Act. Then, we will address ways in which employers can use staffing contracts to limit risks of hiring temporary workers in these ever-changing times.


ROOM - A

Information Governance That Works:
A Practical Approach to Managing Your Information Compliantly, Defensibly and Cost Effectively.

Storage may be cheap, but the cost of failing to manage information proactively can be devastating. Ineffective information governance and management can lead to enormous exposure in data breaches, dramatically increased risks and costs in litigation and governmental investigations, and likely reputational damage.

Whether you are in legal, compliance, IT, or records management, this program will provide you with valuable guidance on how an information governance program dramatically reduces data security, legal, and business risks and costs.

Presented by: Robert Fowler, Director of Professional Services at Jordan Lawrence, Patrick Murphy, Partner, Quarles & Brady LLP; Ellen Basting Dizard, Senior Counsel, Employment Law, Briggs & Stratton Corporation
Major Issues for Commercial Motor Carriers to Address Now, Before the Crash: Standard of Care, Spoliation, and Crisis Response.
An update of Federal and State Regulations on DOT Transportation


3:20 p.m. – 3:30 p.m.
BREAK IN EXHIBIT HALL

All breaks throughout the conference are sponsored by Gold Sponsors: Hanson Reynolds Dickinson Crueger LLC, Walker Morris LLP, and DeWitt Ross & Stevens, S.C.

3:30 p.m. – 4:20 p.m.
ROOM - C

Construction Law Hot Topics.
AGC and AIA documents are converging, but there are still differences and issues with both. What are the ten modifications you can make to an AGC or AIA document to protect your company in your next construction project?

Both the AGC and AIA documents do not contain time limits on express warranties. Therefore, the normal 6-year statute of limitation for written agreements applies. However, there is also a 10-year statute of repose that may apply to possible tort claims. In a recent case involving the construction of the Kalahari resort, the court of appeals explained the interplay of the 6-year statute, the 10-year statute and the economic loss doctrine. The adoption and expansion of the economic loss doctrine in Wisconsin has had a profound effect on this area of law. We will trace the history of the development of this law by reference to seminal cases.

Presented by: Laura Callen, Partner, Stafford Rosenbaum LLP; Eileen Kelley, Attorney, Stafford Rosenbaum LLP; Troy Bronk, In-House Counsel / Contracts Manager, Erdman Company

ROOM - A

Cyber Security Panel Discussion.
Inside counsel have been dealing with cybersecurity issues for a long time. Protecting information systems from outside threats that want to steal, damage, disrupt, or misdirect or from malicious or inadvertent internal actors that overcome or violate security rules is critical. But what happens when the protection fails? This panel discussion will examine the legal implications, including class action lawsuits, indemnification from security providers, governmental agency responses, and other topics. Attendees will be updated on the emerging state of the law and be better able to issue-spot when confronted with cybersecurity issues.


ROOM - B

Top Mistakes Made by In-House Counsel When Litigating – It’s About to Get Awkward.
Okay not really, but please join three experienced trial attorneys to learn some ways to avoid the uh-oh moment. In the end, when in-house counsel makes a mistake, outside counsel makes a mistake, so let's agree to not do that. Nora Gierke, David Frank, and James Denis have all tried cases for companies large and small. They share some of the “issues” their in-house counsel counterparts have had and provide helpful tips on how to avoid those pitfalls.

Presented by: Nora Gierke, Gierke Frank Noorlander, LLC; David Frank, Gierke Frank Noorlander, LLC; James Denis, Global Litigation Counsel, Actuant Corporation
4:20 p.m – 4:30 p.m.
BREAK IN EXHIBIT HALL

All breaks throughout the conference are sponsored by Gold Sponsors: Hanson Reynolds Dickinson Crueger LLC, Walker Morris LLP and DeWitt Ross & Stevens, S.C.

4:30 p.m. – 5:20 p.m.

ROOM - A

Can We Talk? Understanding the Attorney-Client Privilege.
The attorney-client privilege is one of the most valuable protections afforded to clients. Yet, understanding if, when and under what circumstances the privilege applies in the corporate setting are increasingly complex and thorny issues. Here, we will review recent case law specifically applying, or refusing to apply, the privilege to in-house counsel and their various constituents, and provide some practical tips on how to preserve this important privilege.

Presented by: Susan Lovern, Shareholder, von Briesen & Roper, S.C.; Paul M. Selin, Director and Senior Legal Counsel, Direct Supply, Inc.

ROOM - B

In any litigation, whether in court or before an administrative agency, one of the first document requests that a company will receive is for a copy of the employer’s handbook and policies. Litigation opponents will scrutinize handbook policies (or lack thereof) for any misstep that they think will provide an advantage or leverage. This session will provide ACC members with guidance on how to reduce these risks and use handbooks to their advantage by identifying potentially problematic policies and by providing tips on how to revise or enhance policies to strengthen an employer’s legal defenses.

Presented by: Mark Tilkens, Principal, Jackson Lewis, P.C.; Daniel Barker, Principal, Jackson Lewis, P.C.; Jennifer Farley, Assistant General Counsel, Kimberly Clark

5:30 p.m. – 7:30 p.m.
THE LAKEVIEW ROOM
ANNUAL MEETING COCKTAIL RECEPTION

Join us for an evening of networking, complimentary cocktails, and appetizers.

Sponsored by Platinum Sponsors: Foley & Lardner LLP, Littler Mendelson, P.C., and Godfrey & Kahn SC

7:45 p.m.
OPTIONAL NETWORKING AND SOCIAL EVENTS

Paddock Club Dinner
Preregistration is required

Wine Tasting at Vintage Elkhart Lake
Preregistration is required

Sponsored by Platinum Sponsors: Perkins Coie LLP and Davis & Kuelthau, S.C.
FRIDAY – MAY 20, 2016

6:30 a.m. – 7:30 a.m.
PALM GARDEN ROOM
MORNING YOGA
Preregistration is required

Sponsored by Gold Sponsors: von Briesen and Roper and Grant Thornton

8:00 a.m. – 9:30 a.m.
HOT BREAKFAST BUFFET

Sponsored by Gold Sponsors: Reinhart Boerner Van Deuren SC, Buelow Vetter Buikema Olson & Vliet LLC, and Blake, Cassels & Graydon LLP

9:00 a.m. – 9:50 a.m.

ROOM - A

My Company Just Bought a Business: Now What Do I Do? Integration Issues and Challenges for In-House Counsel, Both Before and After Closing.

The focus of the business and legal teams during an acquisition often is on the closing of the transaction itself and not on the myriad issues that need to be addressed in order to make the acquisition a successful investment for the buyer. However, most unsuccessful acquisitions fail due to poor post-Closing integration with the buyer rather than mistakes made in documenting and closing the deal. The speakers will share both an in-house and outside counsel perspective on how issues relating to the integration of the target with the buyer can be addressed successfully before and after the closing. The presentation will include a discussion of how integration concerns should impact due diligence, the allocation of risk in the transaction, the timing of the transaction, post-Closing transition services requirements, and the teams assembled within the buyer to manage the integration issues.


ROOM - B

What U.S. In-House Counsel Need to Know Now About Operating in Canada

A panel of Blakes lawyers and U.S. in-house counsel will discuss the issues and developments impacting U.S. companies with Canadian subsidiaries or doing business in Canada. Topics will include:

- Alberta’s new NDP government and what it may mean for taxes, the oil sands, and green energy
- The Bhasin decision: Supreme Court of Canada finds a duty of honesty between contracting parties
- Drug and alcohol testing of Canadian employees
- Managing Quebec’s French language requirements: the sign decision
- Background checks – what is permissible?
- The 14th securities commission – a new national Canadian regulator
- New $1M record fine under Canada’s anti-spam legislation (CASL)
- Privacy law implications for your electronic HR and customer records
- New accessibility legislation and employment standards changes

Presented by: Mark Adkins, Partner, Blakes; Daryl Cukierman, Employment & Labour Group, Blakes; Jascha Walters, Legal Counsel, Software One
9:50 a.m. – 10:00 a.m.
BREAK IN EXHIBIT HALL

All breaks throughout the conference are sponsored by Gold Sponsors:
Hanson Reynolds Dickinson Crueger LLC, Walker Morris LLP, and DeWitt Ross & Stevens, S.C.

10:00 a.m. – 10:50 a.m.

ROOM - A

Licensing in IP Transactions – What Your Mother Never Told You.
A discussion of the various types of licenses for different types of IP—Patents, Trademarks, Copyrights, Trade Secrets, Rights of Publicity as they impact uses of software, brands, advertising, product development, and litigation. Explore issues that arise in the various licenses and strategies for addressing them. Address the pros and cons of rights of first refusal, exclusivity, sublicensing, and territorial and field restrictions. Examine best practices for representations and warranties, royalty bases, and underlying rights enforcement.

Presented by: Adam Brookman, Boyle Fredrickson, S.C.; William Walbrun, Senior European IP Counsel, Rockwell Automation

ROOM - B

So You Got a Reservation of Rights Letter, Now What? A Policyholder’s Perspective
This panel discussion will address best practices and key issues for in-house counsel regarding reservation of rights letters, from the perspective of the policyholder. Key issues for discussion will include: selection of counsel, recoupment of defense costs, cooperation, and confidentiality/privilege issues. The presenters will incorporate hypothetical and real-life case scenarios to invite audience participation in navigating the receipt of a reservation of rights letter for the in-house counsel who does not specialize in insurance coverage law, with the goal of providing in-house counsel with “best practices” for dealing with reservation of rights letters.


10:50 a.m. – 11:00 a.m.
BREAK IN EXHIBIT HALL

All breaks throughout the conference are sponsored by Gold Sponsors:
Hanson Reynolds Dickinson Crueger LLC, Walker Morris LLP, and DeWitt Ross & Stevens, S.C.

11:00 a.m. – 11:50 a.m.

ROOM - B

OSHA – A Not So Lame Duck: What's Up and What's Next.
Both OSHA and the “little OSHAs” in those states that have their own plans are aggressively inspecting worksites around the country and citing employers whose employees work at those sites for hazards OSHA identifies. Federal OSHA also is regulating industries primarily by “re-interpreting” its standards, regulations, and enforcement schemes, not by rulemaking. This trend of the past seven-plus years is likely, if anything, to ramp up as the next presidential election cycle approaches. This OSHA presentation will cover “what’s up now” and what we imagine we are likely to see in the next 18 to 24 months.

Presented by: Charles B. Palmer, Partner, Michael Best & Friedrich LLP, Labor and Employment Relations Practice Group; Deric DuQuaine, General Counsel, Milk Source; Joan Farrell, Vice President and General Counsel, Goodwill Industries of Southeastern Wisconsin, Inc.
The Most Important Steps for In-House Counsel After a Data Breach.

In 2015 the ACC Foundation: The State of Cybersecurity Report found that one-third of in-house counsel have experienced a corporate data breach. As the amount of digital transactions only increase in industries such as retail, financial services, manufacturing, and more—it’s more a matter of when, not if, a data breach happens. At that point following a breach, in-house counsel often find themselves at an intersection of legal, IT, outside counsel, and business claims to deal with issues such as:

- Reputation loss
- Government/regulator action
- Insurance policy claims

This panel will discuss the importance of detailed planning prior to an incident, the key aspects of a well-drafted Incident Response Plan, the crucial roles of various players during an Incident Response, and the importance of moving beyond pure defense toward a posture of “resilience” over time, as well as the role in-house counsel play in each step—from supporter to leader.

Presented by: Johnny Lee, Grant Thornton LLP; Ronald Sung, Aon; Jennifer Rathburn, Co-Chair, Data Privacy & Security Team, Quarles & Brady LLP

11:50 a.m. – 12:00 p.m.

ROOM - A

CLOSING REMARKS AND ADJOURNMENT

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- Recharge Bars Sponsored by Gold Sponsor: von Briesen & Roper S.C.

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Beyond The Rules: Leveraging The New Federal Discovery Rules
To Curtail Discovery Cost And Expedite Resolution

11th Annual Chapter Conference & Meeting of Members
Association of Corporate Counsel
May 19, 2016

Presentation by: Susan Schellinger, Sherry Coley and Ryan Murphy

I. Amendments to the Federal Rules of Civil Procedure
   a. Went into effect Dec. 1, 2015
   b. Designed to control the cost and delays associated with civil litigation
   c. Rules have been trying to address excessive discovery since 1983
   d. Rule 1: Now requires parties, as well as courts, to construe, administer, and employ the Rules in a manner "to secure the just, speedy, and inexpensive determination of every action and proceeding."

II. Why Amend?
   a. Exponential growth of ESI. There are more devices connected to the Internet (phones, tablets) than there are people on the planet!\(^1\) Sources of discoverable material now include:
      i. Mobile devices (texts, voicemail)
      ii. Social media (Facebook, Twitter, LinkedIn, Instagram)
      iii. Internal corporate chat tools
      iv. Cloud repositories (Dropbox, Google Drive)

III. What Was Amended?
   a. Early case management – expedites the initial stages of litigation
   b. Scope of discovery – emphasizes proportionality and reasonableness

IV. What Was Rejected?
   a. Limits on number of depositions (10 to 5 per party), length of depositions (7 to 6 hours), number of interrogatories (25 to 15), and number of requests to admit (limit 25).
   b. Public comment (including from judges) thought the reductions would spawn collateral litigation
   c. Proposals withdrawn by Rules Committee in April 2015.
   d. Instead, Rules 30, 31, 33 (depositions, interrogatories) incorporate Rule 26’s emphasis on proportionality

V. Early Case Management
   a. Changes to Rule 4(m): Time to serve summons/complaint reduced to 90 days (from 120).

\(^1\) http://www.independent.co.uk/life-style/gadgets-and-tech/news/there-are-officially-more-mobile-devices-than-people-in-the-world-9780518.html
i. Committee wanted 60 days. Commenters were concerned this wouldn’t be enough time to serve multiple defendants, hard-to-find defendants, or defendants having to be served by the US Marshals.

b. Changes to Rule 16(b)(1): Encourages scheduling conferences to involve “direct simultaneous communication” between parties (i.e., phone, in-person, not mail)

c. Changes to Rule 16(b)(2): Scheduling order issued the earlier of: 90 days after any defendant has been served (reduced from 120 days) or 60 days after any defendant has appeared (reduced from 90)

d. Changes to Rule 16(b)(3): Scheduling orders can require a conference with the court before filing a discovery motion.
   i. ED Wis Local Rule 37 encourages parties to seek a pre-motion conference
   ii. The goal is to resolve discovery disputes without time-consuming and costly briefing

e. Changes to Rule 26(d)(2): Can now serve requests for documents before the Rule 26 conference. (Deemed served at the first Rule 26 conference.)

f. Parties should be prepared to talk substantively about issues and discovery at the Rule 26 conference. Evaluate early the location and volume of discoverable material.

g. Note: these changes may front load litigation costs

VI. Proportionality in Discovery

a. Changes to Rule 26(b)(1)
   i. Parties may obtain discovery regarding any non-privileged matter that is relevant to a claim or defense and proportional to the needs of the case
   ii. Replaces reference to “reasonably calculated to lead to the discovery of admissible evidence.” Can’t object on those grounds!
   iii. Proportionality considerations include:
       1. importance of the issues at stake in the action;
       2. amount in controversy;
       3. parties’ relative access to relevant information;
       4. parties’ resources;
       5. importance of the discovery in resolving the issues; and
       6. whether the burden or expense of the proposed discovery outweighs its likely benefit.
   iv. These considerations were previously in Rule 26(b)(2)(C); now include new factor of relative access, see (iii)(3).

b. Changes to Rule 26(c)(1)(B):
   i. Protective orders may shift the cost of discovery.
   ii. This is not intended to be the new normal. The usual practice remains that the responding party bears the cost of production (per Rules Committee).

c. NOTE: Courts have historically considered proportionality in discovery and been able to limit discovery if the burden/expense outweighed the benefits
and shift costs. The 2015 Amendments reinforce the fact that parties and courts must consider what is necessary for the case in light of related burdens.

VII. Requests for Production
   a. Changes to Rule 34(b)(2)(B):
      i. **No boilerplate objections.** Objections must "state with specificity the grounds for objecting."
         1. Can’t simply object as overbroad, unduly burdensome, or vague. Must say how.
         2. If overbroad, you should state the scope that is not overbroad (per Rules Committee)
      ii. **Specify whether production is being withheld.** Objections must state "whether any responsive materials are being withheld on the basis of the objection."
         1. Stating the limits that have controlled the search for materials (e.g., date range, scope of sources or search terms used) qualifies as a statement that the materials have been withheld (per Rules Committee)
      iii. **Limitations on rolling productions.** Production must be completed within the time for inspection in the request or other reasonable time specified in the response.
   b. Note: these changes may lead to increased cost in preparing responses

VIII. Practice Tips
   a. Do your claims and defenses unnecessarily expand the scope of discovery?
   b. Keep proportionality and cost of response in mind when drafting requests.
   c. Don’t object on basis that scope of discovery is what is “reasonably calculated to lead to the discovery of admissible evidence.” That language is no longer in the federal rules.
   d. In negotiating scope of response, be prepared to discuss specifics about burdens and expenses.
   e. Courts are looking for cooperation: offer concessions to demonstrate reasonableness (e.g. producing part of the requested information, cost shifting)
   f. Consider phasing discovery, with most relevant and accessible sources searched first.

IX. Preservation of ESI
   a. Changes are intended to encourage preservation of discoverable information while reducing cost and burdens associated with over-preservation or non-willful spoliation.
   b. Changes to Rule 37(e): Parties seeking sanctions for failure to preserve ESI must show:
i. ESI should have been preserved in anticipation of litigation;
ii. ESI was lost because the party did not take reasonable steps to preserve it;
iii. the lost ESI cannot be restored or replaced through additional discovery.

c. If shown, the court can order, upon a finding of prejudice, measures no greater than necessary to cure the prejudice or, upon finding intent to deprive the other party of the ESI (i.e., bad faith), sanctions (presumption, instruction, dismissal or default judgment).
   i. Rule 37(e) applies only to ESI. Committee rejected proposed application to all discovery.
   ii. The changes are consistent with existing case law on ESI duty to preserve (focus on reasonableness) but codify bad faith requirement for sanctions as a result of spoliation (some courts were imposing sanctions for negligent spoliation).

d. Duty to preserve remains, but no need to over-preserve to protect against spoliation claims. E.g., if information is stored in 2 locations, no need to preserve both.

e. The reasonableness standard means a court will expect more robust preservation practices from parties with sophisticated IT systems.

X. Cases Analyzing the Amendments: Courts are applying the amendments retroactively and reconsidering previous orders

   i. Plaintiffs altered an email prior to production to create an appearance that supported their allegations. Defendants moved for sanctions under Rules 26, 37, and court’s inherent authority of dismissal, adverse inference, evidentiary preclusion, and fees and costs. Plaintiffs produced the original version and argued that sanctions were not warranted because the document was not lost or destroyed.
   ii. Court applied amended Rule 37 retroactively and imposed sanctions, concluding that the Plaintiffs could not save themselves under Rule 37 by virtue of their misdeeds having been discovered.
      1. Even if Rule 37 did not apply, court concluded it could sanction under its inherent authority.
   iii. Court found Plaintiffs intentionally altered the email in bad faith. Sanctions included precluding Plaintiffs from using their version of the emails and assessing costs and fees incurred by Defendants in establishing the misconduct and securing relief.

i. In July 2015, court ordered sanctions for spoliation and awarded a permissive adverse inference instruction after finding that Plaintiff unintentionally failed to preserve text messages.

ii. After amendment to Rule 37(e), court reconsidered, vacated its sanctions due to lack of intentional spoliation, denied adverse inference, but allowed evidence of spoliation to be introduced at trial.


i. Court examined both sides’ requests to produce after Defendant asked Plaintiff to go through its produced documents and identify which were responsive to Defendant’s requests. The court found both sides’ requests contrary to the intent of the amended rules.

1. Defendant’s requests were “omnibus” and “improper on their face,” lacking specificity and using boilerplate terms such as “including, without limitation.”

2. Plaintiff’s requests were no better, also using boilerplate and lacking specificity. Court particularly criticized the production of 1 terabyte of information (millions of pages) without providing any guidance as to where responsive documents could be found.


i. Defendant sought access to information on tubes of compounds that Plaintiff’s expert had cited in a related litigation. Plaintiff argued it should not have to produce the information because the compounds were not same. Defendant argued it should not have to take Plaintiff’s word on what was in the tubes.

ii. Court rejected Defendant’s motion to compel, stating its request was “precisely the kind of disproportionate discovery that Rule 26 – old or new – was intended to preclude.”

1. Court compared the request to requiring GM to produce discovery on Buicks and Chevys in a patent case about Cadillacs simply because all three happen to be cars.


i. Plaintiff served broad discovery requests on Defendant seeking production of all house plans from 2000 to present (Plaintiff alleged Defendant infringed on its copyrights in the construction of homes). Defendant objected to the request as overly broad and produced a few designs related to the copyrights identified in the complaint.
ii. Court found Defendant’s interpretation too narrow. The complaint alleged infringement of particular copyrights as well as others to be ascertained during discovery.

iii. Court rejected Defendant’s proportionality argument because it failed to explain why allowing Plaintiff to inspect its entire inventory of designs would be unduly burdensome. Defendant’s bare assertion that the request was not proportional was insufficient to deny the request for relevant material.

* * * * *

As one of Wisconsin’s leading business law firms, Davis & Kuelthau, s.c. understands that success in business is seldom an unhindered path. Our team of business, employment and litigation professionals help Wisconsin businesses and their owners navigate their legal challenges every day. From advising on the myriad of employment laws and regulations, protecting business interests in litigation, executing the purchase or sale of a business to apprising clients of the latest tax and wealth preservation strategies, we offer far more than just legal advice. We bring real-world experience and understanding, and a results oriented mindset to help businesses achieve their objectives.

Together, we advise a wide array of companies, including manufacturers, distributors, real estate and construction firms, food and beverage producers, and B2B service providers across Wisconsin and beyond. Whether a sole proprietorship or a multinational Fortune 500 company, Davis & Kuelthau is well-positioned to help you succeed. Learn more at www.dkattorneys.com.

If you have any questions about the information outlined in our session materials, please contact Susan G. Schellinger, at 414.225.1492 / sschellinger@dkattorneys.com or Sherry D. Coley at 920.431.2239 / scoley@dkattorneys.com.
Sherry D. Coley  
Senior Counsel

Sherry is a member of Davis & Kuelthau’s Litigation Team practicing in the Green Bay office. Her practice primarily focuses on complex business litigation, with an emphasis on contract disputes, business torts, financial services litigation, real estate foreclosures and work-outs, and tax assessment appeals.

Sherry has represented financial institutions in state and federal court on a variety of commercial lending disputes, including defense of counterclaims raised in response to foreclosure or deficiency actions, and disputes arising from insolvent borrowers, including proceedings in bankruptcy court. In addition, she has defended manufacturers in product liability actions involving personal injury, wrongful death and property damage.

Sherry has significant trial experience in both state and federal courts and jury trials. She has represented clients in appeals pending in the state appellate courts of Wisconsin and the United States Court of Appeals for the Seventh Circuit.

Sherry is fluent in French.

Professional Activities

- Admitted, State of Georgia
- Admitted, State of Wisconsin
- Admitted, Seventh Circuit Court
- Admitted, United States District Court, Eastern District of Wisconsin
- Admitted, United States District Court, Western District of Wisconsin
- Member, Brown County Bar Association
- Member, Outagamie County Bar Association
- Member, Eastern District Bar Association
- Member, Seventh Circuit Bar Association
- Member, Defense Research Institute (DRI)
- Member, American Bar Association (Product Liability Committee)
- Secretary, Wisconsin State Bar (2014 – present)
- Chairperson, Wisconsin State Bar - Board of Governors (2013-2014)
- YLD liaison, Wisconsin State Bar - Board of Governors, (2012 – 2013)
- Co-Chair, Wisconsin State Bar - Board of Governors, Challenges Facing New Lawyers Task Force, (2011 – 2013)

Practice Areas

- Commercial Finance
- Commercial Litigation
- Food and Beverage Industry
- Litigation

Education

- Juris Doctor, Marquette University Law School
- Bachelor's Degree, Drake University, magna cum laude, with honors
Community Involvement
- President, Building for Kids Children’s Museum - Board of Directors, (2016)
- Secretary, Building for Kids Children’s Museum - Board of Directors, (2013 – 2015)
- Board of Directors, Phoenix Fund
- Member, Executive Women's Golf Association, Fox Cities/Green Bay Chapter

Published Articles/Presentations
- February 17, 2010, Fundamentals of Employment Law Seminar
- November 14, 2006, Executive Women's Golf Association (EWGA) Fox Cities/Green Bay Chapter

Recognitions
- Fellow, Wisconsin Law Foundation (2015)
Susan G. Schellinger
Shareholder

Mindful of the necessary synergy between a client’s business goals and litigation impact, Sue provides exceptional client service through substantive expertise and frequent communication with clients regarding case assessment and strategy. Her clients include mid and large-sized corporations, real estate developers, individuals, and governmental units.

Sue’s sage counseling approach is backed by 23 years of experience litigating a broad range of complex matters in state and federal trial and appellate courts as well as in arbitration and other alternative dispute resolution proceedings. Her practice has a substantive focus on insurance coverage litigation and construction law. Relative to insurance coverage, Sue exclusively represents policyholders against insurance companies and brokers to obtain coverage — often after the insurer denied. In construction, she has represented owners, contractors, and design professionals on a variety of projects.

Sue also offers substantial experience and an ongoing practice in lender liability, securities litigation, noncompetition agreements, and trade secrets cases. Additionally, she has represented clients in breach of contract, warranty claims, products liability and investor disputes.

Representative Clients
- AECOM, Inc.
- Boulder Brands, Inc.
- HealthEOS by Multiplan
- Lincoln Wood Products, Inc.
- Kolbe & Kolbe Millwork Co., Inc.
- Regal Beloit Corporation
- Southeast Wisconsin Professional Baseball Park District (Miller Park)

Published Cases
- Central Brown County Water Authority v. Consoer, Townsend Enviroydyne, Inc., 2011 WL 5040453 (E.D. Wis. 2011)
- Merge Healthcare, Inc. v. Linden, 2010 WL 4065588 (E.D. Wis. 2010)
- Feinstein v. Wood, Hat & Silver, LLC, 2010 WL 3584002 (E.D. Wis. 2010)
Professional Activities

- Board of Directors, Davis & Kuelthau
- Hartford Golf Club
- Executive Women’s Golf Association, Milwaukee Chapter
- Member, Milwaukee Bar Association
- Member, Wisconsin Bar Association, Construction Law Section, Litigation Section
- Member, American Bar Association

Recognitions

- Martindale Hubbell AV® Peer Review Rated

Published Articles / Presentations

- Should Reverse Bad Faith Claims Exist? August 5, 2015, Law360 Twitter Chat
- Litigation is Often Unavoidable. Overspending and Poor Results Are Not. Control Your Fate, presented May 15, 2014 to Association of Corporate Counsel Wisconsin Chapter
- Ask, and You May Receive – Knock and the Door of Insurance Coverage Secrets Will Be Opened to You, presented May 9, 2013 to Wisconsin Association of Corporate Counsel

Maypark v. Securitas Security Services USA, Inc., 321 Wis. 2d 479, 775 N.W.2d 270 (Wis. App. 2009)


Southeast Wisconsin Professional Baseball Park District v. Mitsubishi Heavy Industries America, Inc., 304 Wis. 2d 637, 738 N.W.2d 87 (Wis. App. 2007)


Notable Representations

Insurance coverage litigation

- Sue obtained insurance coverage under both commercial general liability and professional errors and omissions policies for claims brought against the owner of Miller Park by the roof builder. She ultimately obtained a ruling by the circuit court that the insurers had breached their duty to defend, requiring payment of all defense costs, along with the insurers’ payment of indemnity.
- Sue represented a multinational company in a dispute where its insurer sought to recover the multi-millions of dollars paid to defend claims made against our client based on the insurer’s interpretation of a governing policy endorsement. She defeated the insurer’s claim, convincing the ruling judge that the insurance company was required to pay all of the defense costs.
- Sue acts as coverage counsel for manufacturers that are the target of class action lawsuits, enforcing rights to coverage under policies spanning multiple years for damage allegedly caused by defects in their products.
- Sue counsels multiple manufacturing companies that are targets of environmental cleanup actions to locate and maximize coverage under historical policies issued before the absolute pollution exclusion became common.
- Sue submitted an amicus brief to the Wisconsin Supreme Court on behalf of a business group in *Plastics Engineering Company v. Liberty Mutual*, a case in which the high court issued a landmark decision significantly impacting insured’s coverage under standard commercial liability policies for asbestos claims and environmental claims where the insurer had denied coverage for national counsel.
- Sue obtained a federal court ruling requiring an insurer to reimburse a client for the millions it paid to national counsel to oversee defense of product liability claims.

Construction litigation

- Sue represented the public owner of Miller Park in litigation with contractors arising out of the construction of the baseball stadium and related facilities. She defended the public owner of the stadium in a $100 million lawsuit
brought by the roof builder, obtaining a settlement resulting in payments of more than $30 million to the owner.

- Sue obtained summary judgment dismissal of a multi-million dollar claim against the Miller Park District for the District’s alleged failure to construct roadway improvements around Miller Park.
- Sue has brought claims on behalf of owners against architects and design professionals for defective design. After an arbitration before the American Arbitration Association, she obtained an award in favor of the owner for the full amount of damages sought for remediation of the building, including lost profits.

**Commercial Litigation**

- Sue defended a manufacturer against a $50 million claim by its foreign partner for breach of a joint venture agreement. The representation was a significant success in several regards: Sue was able to obtain full coverage for all of the client's defense costs under a Commercial General Liability (CGL) policy, and after a week-long arbitration in Dallas before the International Chamber of Commerce, all claims against the client were dismissed, and an award was entered in favor of the client on its counterclaim.
- Sue successfully defended a claim brought by a health care group for breach of a network agreement, obtaining dismissal before trial based on limiting language in the agreement and Wisconsin’s voluntary payment doctrine.
- Sue defended a Fortune 500 executive in a dispute brought by his former employer for breach of a non-compete agreement and violation of the trade secret statutes. Sue was able to fend off a preliminary injunction motion brought by the former employer seeking to enjoin the executive’s employment with his new employer. The denial of the motion gave the executive significant leverage to negotiate a favorable resolution which allowed him to accept employment with the former employer’s prime competitor.
The DOL’s Proposed Changes to the White Collar Overtime Regulations and the Ongoing Attack on Independent Contractor Classification

May 19, 2016 • Elkhart Lake, WI
PRESENTED BY:

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Proposed Changes – Salary Basis

• Set the minimum salary required for exemption for executive, administrative, and professional employees at the 40th percentile of weekly earnings for full-time “non-hourly paid” employees
  – Expected to increase from $455/week (or $23,660/year) to $970/week (or $50,400/year) by the time a Final Rule is issued

• DOL sought comments on the possibility of including nondiscretionary bonuses paid monthly or more frequently to satisfy up to 10% of the minimum salary level

• DOL proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile (40%) or inflation (CPI-U)
Generally, employers objected to the proposed minimum salary level as much too high.

As an alternative, if DOL remains at over $50,000, some commenters requested a 3 to 5 year phase in period for the increase.

Generally employers supported allowing bonuses to count towards the minimum salary level.

Near universal opposition to automatic annual increases to the minimum salary level.

Some commenters, however, suggested an alternative of automatic increases every 5 years.
The DOL “is not proposing specific regulatory changes at this time.”

DOL “seeks to determine whether, in light of our salary level proposal, changes to the duties test are also warranted” and “invites comments on whether adjustments to the duties test are necessary....”
Possible Changes to the Duties Tests

• Redefining “primary duty”
  − Requiring employees to spend a minimum amount of time performing work that is their primary duty;
  − Adopting the “California rule” requiring that 50% of an employee’s time be spent exclusively on work that is the employee’s primary duty.
• Elimination of the “concurrent duties” provision
• Return to the “long” and “short” test structure
• New examples of exempt and non-exempt job titles, categories, and/or duties
Many employer comments objected to any changes in the duties tests because of DOL’s failure to provide sufficient notice and opportunity to comment, as required under the Administrative Procedure Act.

Some commenters, especially in the computer industry suggested examples of exempt positions to include in the final regulations.
What is Likely to Change

• Salary Level
  – Although DOL may moderate down a bit, unlikely to increase salary level above $50,440
  – Likely to implement automatic annual increases
  – Unlikely to allow bonuses to count towards the minimum salary level

• Duties Tests
  – Likely to move towards the California 50% primary duty rule, but not likely to bring back 80-20 rule under a long test
  – Likely to eliminate concurrent duties
Preparing for Change

- Do not wait until DOL publishes its final rule to begin preparing for change
- Act now to determine the potential impact of a $50,440 minimum salary level
- Conduct a job duty review
- Calculate the cost of increasing salary to $50,440 vs. cost of reclassification
Maintaining the Exemption

- Budget for the cost of increasing salaries
- Consider decreasing incentive pay to offset salary increases
- Update job descriptions to support exempt classification
- Require employees to certify their job descriptions are accurate on an annual basis during performance review process
Reclassification

• Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
  – Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
  – How will we calculate overtime for salaried non-exempt employees?
• How will reclassified employees track their hours?
• What steps can we take to control overtime hours?
• What new/revised policies do we need?
• How will we communicate the changes to employees?

- Overtime
- Family & Medical Leave
- OSHA Protection
- Civil Rights Laws
- Affordable Care Act
- Unemployment Insurance
- Workers Compensation
The Real Reason

- Loss of tax revenue
  - Studies estimate that the federal government loses between $2.7 to $4.3 billion annually
  - State studies have shown losses of employment tax, unemployment tax and workers’ compensation premiums

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<th>UI Losses</th>
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<th>State Taxes</th>
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<td>OH</td>
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• Under the FLSA, an individual is an employee if, as a matter of economic reality, an individual is dependent on the alleged employer
• In contrast, independent contractors have economic independence and operate a business of their own
• Courts have adopted a six-factor test of economic dependence, and no single factor is determinative
The Six Factors

**Integration** – An IC does not perform work that is integral part of the employer’s business

**Profit & Loss** – An IC’s managerial skill can affect the opportunity for profit or loss

**Investment** – An IC makes a significant investment in his or her own business

**Skill and Initiative** – An IC performs work that requires special skill and initiative

**Length of the Relationship** – An IC does not have an ongoing or permanent relationship with its clients

**Control** – A company does not control how, when or where an IC performs the work
IRS 20-Factor Test

1. Does the company control when, where and how the IC performs the work?
2. Does the company train the IC?
3. Are the IC services integral to the company’s business?
4. Must the IC personally perform the services?
5. Are the IC’s assistants hired and controlled by the company?
6. Is there a continuing relationship?
7. Does the company set work hours?
8. Is the IC working substantially full time for the company?
9. Is the work performed on the premises of the company?
10. Does the company set the order or sequence of the work?
11. Must the IC submit reports?
12. Is the IC paid by hour, week or month?
13. Does the company pay the IC’s business expenses?
14. Does the company furnish significant tools, materials or equipment?
15. Has the IC invested in facilities?
16. Can the IC realize a profit or loss?
17. Does the IC provide substantial services to multiple unrelated parties?
18. Are the IC’s services available to the general public?
19. Does the company have the right to terminate at will?
20. Does the IC have the right to terminate at will?
Wisconsin Law

• Under unemployment law, the IC’s work must be free from control by the company, plus an additional 6 out of 9 requirements must be met

• Common Law Test:
  – “Right to control the manner in which the details of the work [are] to be done”

• Some consider the Wisconsin standard to be the most difficult to meet
Best Practices

1. Never engage a former employee as an IC
2. Never engage an IC who was an employee anywhere within the last 18 months
3. Never be an IC’s first customer
4. Never engage an IC to perform the same work as employees
5. Never prohibit an IC from working for other companies
6. Never provide training to an IC
7. Never attempt to control how, where or when work is performed
8. Never provide tools or equipment
9. Never reimburse for business expenses
10. Never convert an IC to an employee
questions?
thank you.
LAURA LINDNER

Laura Lindner is shareholder with Littler Mendelson, and practices out of the firm’s Milwaukee and Chicago offices. Ms. Lindner’s practice focuses on representing employers in a wide range of employment and benefits litigation throughout the Midwest including claims of discrimination, harassment, and retaliation, claims under the FMLA, FLSA, and ERISA, as well as state tort, breach-of-contract, non-compete, and trade secret claims. She has served as lead counsel in class and collective actions and EEOC pattern and practice suits. In addition, Ms. Lindner counsels employers on litigation, class action avoidance strategies, conducting investigations of harassment, fraud and other employee misconduct, and leave of absence and accommodation issues. In addition to more than 20 years in private practice, Ms. Lindner was Senior Counsel at SBC Communications (now AT&T) in Chicago for two years, where she handled employment and benefits litigation for the Company’s Midwest Region.

JENNIFER CIRALSky

Jennifer Ciralsky is a shareholder with Littler Mendelson's Milwaukee office. Ms. Ciralsky counsels employers on numerous areas of employment law, including leaves of absence and accommodation issues, wage and hour compliance, conducting workplace investigations, implementing employment policies, and complying with other state and federal employment laws. Ms. Ciralsky's practice also focuses on representing employers in employment litigation in federal and state courts and agencies, including claims of discrimination, harassment, and retaliation, as well as claims under the FMLA and FLSA, including wage and hour collective and class actions. Ms. Ciralsky has represented employers in a broad range of industries, including media, hospitality, retail, manufacturing, healthcare, and education, as well as non-profit organizations. Ms. Ciralsky received a law degree and MBA from Georgetown University.
Consumer Class Actions
Association of Corporate Counsel, Wisconsin Chapter, 2016 Annual Conference

Thursday, May 19, 2016

Sarah Crooks
Jeanne Cullen
Labeling and Marketing:
Targets for Class Actions
Filings Against Industry on the Rise

Food and Beverage Industry Class Actions Filed: 2008 – 2016
Filings Shifting Away from Natural Food and Beverage Industry Class Actions by Category

**2015**
- "All Natural": 53
- False or Misleading: 52
- Slack Fill: 30
- Health Misrepresentation: 12
- Other (4-Mel, ECJ, PHOs): 8

**2016**
- "All Natural": 52
- False or Misleading: 10
- Slack Fill: 8
- Health Misrepresentation: 1
- Other (4-Mel, ECJ, PHOs): 14
Filings In More Jurisdictions

Food and Beverage Industry Class Actions by Jurisdiction

2014

- California: 57
- Florida: 17
- New York: 4
- Other: 4

2015

- California: 63
- New York: 32
- Florida: 17
- Missouri: 14
- Illinois: 12
- Other: 20
Advertising Food and Beverage Challenges

**Threats:**
- Operation Full Disclosure
- FTC Demand Letters
- State and Federal Lawsuits
- Competitors: Lanham Act Challenges
- State and Federal Regulator Actions
- National Advertising Division Actions
- TV Networks

**Penalties:**
- Injunctions
- Corrective advertising
- Consumer redress (e.g., refunds because quality isn’t as advertised)
- Civil and criminal fines and penalties
- Damages
- PR fallout
Ad Claims and Substantiation

Advertising Claims

• Objective claims must be true, not misleading, and substantiated
• Qualifying information must be clear and prominent so consumers are not misled
• Advertisers are responsible for express and implied claims reasonably conveyed by promotional materials
• But materially misleading or deceptive? Tendency to deceive?

Clear and Conspicuous Disclosure

• Important information that clarifies a claim must be clearly and prominently disclosed
• Consider placement, prominence, and clarity
• Same laws apply to digital media
Practical Tips for Reducing Advertising Risk

• Use FDA and USDA guidance as a starting point
• Monitor suppliers and know your ingredients
• Consider seeking third-party certification
• Spell out your intended and supported message – disclose, disclose, disclose
• Examine whether the message is true, not misleading, and substantiated in the overall context of the marketing and labeling
• Conduct consumer surveys
• Monitor consumer complaints and social media, and adjust the messaging accordingly
Arbitration Clauses
Enforceability Update
Arbitration Clauses: Enforceability Update

**Trend of Favoring Arbitration Continues**

- **Gilmer v. Interstate/Johnson Lane Corp.**
  Statutory claims may be subject to arbitration

- **AT&T Mobility v. Concepcion**
  Class action waivers enforceable

- **DirectTV, Inc. v. Imburgia**
  State law could not invalidate enforceability of arbitration clauses with class action waiver

- **Stolt-Nielsen SA v. Animal Feeds Int’l Corp**
  Silence is not consent to arbitrate class claims

- **American Express v. Italian Colors Restaurant**
  Arbitration clauses are not invalid because they are “unfair”
Arbitration clauses are creatures of contract and a well drafted class waiver is enforceable.

When Class Arbitration is Permissible

- Arbitrator’s decision in favor of class arbitration is binding

Class Action Waivers Generally Valid

- Arbitration waiver containing class action waivers are valid
- Express consent required for class arbitration
- Statutory claims may be arbitrated
Challenges to Arbitration Clauses

- Basic contract formation defenses
- Fee Shifting Provisions
- Scope of the arbitration clause vs. the actual claims asserted

Examples

- *McLellan et al. v. FitBit, Inc.*, Complaint ¶¶ 7-11
  - Fitbit users cannot use the PurePulse Tracker until they set up an account online
  - Arbitration agreement is presented to consumers at Fitbit.com *after* purchase from a third-party retailer
  - Attempting to bind consumers post-purchase is “unconscionable, invalid, and unenforceable”
  - **Class Definition (Nationwide):** All persons or entities in the United States who purchased a Fitbit PurePulse Tracker, as defined herein, *excluding those who purchased their PurePulse Trackers directly from Fitbit on Fitbit.com* and who did not opt out of the arbitration agreement
Standing and Statutory Damages

Predictions on *Spokeo, Inc. v. Robins*
Spokeo, Inc. v. Robins: Important questions

- Factual Scenario
  - Standing under Article III based solely on statutory damages, no-injury claim

- Constitutionally irreducible minimum under Article III: *injury in fact*, traceability, redressability
  - Spokeo: Actual injury v. statutory damages

- Sufficiency of future harm alleged
  - An opportunity to clarify after Monsanto & Clapper
Spokeo, Inc. v. Robins: What might happen

- Reserve ruling until next term
- Establish Art. III standing requirements for named plaintiffs
- Issue narrow ruling on specific facts and leave open questions
THE REVIVED ATTEMPTS TO DEFEAT ARBITRATION CLAUSES IN CLASS ACTIONS

BACKGROUND

The Supreme Court held in *AT&T Mobility v. Concepcion* that arbitration clauses containing class action waivers were valid in consumer contracts and reinforced the importance of the Federal Arbitration Act. 563 U.S. 333, 350-52 (2011). This term in *DirectTV, Inc. v. Imburgia*, the Court once again held that class action waivers contained in arbitration agreements are enforceable under the FAA and cannot be invalidated on state law grounds inapplicable to any other contract. 136 S. Ct. 463, 471 (2015). These decisions were not the first to treat arbitration clauses favorably under the FAA. Underlying the Supreme Court’s arbitration decisions, however, is the central point that arbitration waivers are creatures of contract. As Justice Breyer explained this past December: “The Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver.” 136 S. Ct. 463, 468 (2015).

CLASS ACTION WAIVERS IN ARBITRATION CLAUSES & BASIC LEGAL PRINCIPLES

A class action waiver is typically a provision in a contract, often in a clause mandating arbitration over any disputes that arise out of that contract, which prevents someone from filing a class action lawsuit. Arbitration clauses are found in many types of contracts ranging from employment to consumer goods. The Supreme Court has made a few basic principles clear:

- **Statutory claims may be subject to arbitration:** In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court held that there was no conflict between enforcing arbitration agreements related to Age Discrimination in Employment Act (“ADEA”) claims and the important social policies embodied in that statute. The Supreme Court reached the same conclusion nearly two decades later in *CompuCredit Corp v. Greenwood*, 132 S. Ct. 665 (2012), in which the Court held that claims brought under the Credit Report Organizations Act (“CROA”) were arbitrable.

- **Silence is not consent to arbitrate class claims:** The scope of arbitration is defined by the bilateral contract creating the requirement to arbitrate claims. This basic premise was behind the Court’s decision in *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). The Supreme Court held that an arbitration panel exceeded the authority it had under the FAA by imposing class-action like procedures not specified in an arbitration agreement. This principle tells us that a respondent in an arbitration will not be exposed to class-action arbitrations by mere failure to say they are not permitted.

- **An arbitrator’s decision that there can be class arbitration is binding:** Although *Stolt-Nielsen* tells us that an arbitration clause that is silent as to class arbitration is not binding, *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013), provides that an arbitrator’s ruling that an arbitration agreement authorizing class arbitration must be upheld—even if the arbitrator’s
interpretation of the arbitration agreement is incorrect. Section 10(a)(4) of the FAA affords very limited review of an arbitrator’s decision. An argument that an arbitrator interpreted the contract incorrectly is generally not subject to review.

- **Class action waivers are valid**: Not only did the Supreme Court decide *Concepcion* and *DirectTV* with an air of deference towards the FAA, in *American Express Co v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Supreme Court rejected the argument that arbitration clauses should be invalid because they are unfair. Even though the plaintiff’s cost in arbitrating a dispute individually could exceed potential recovery, the Court found that justification no reason to invalidate an arbitration clause.

### CHALLENGING ENFORCEMENT TO ARBITRATION CLAUSES AND CLASS ACTION WAIVERS

Despite the wave of Supreme Court decisions favoring arbitration clauses containing class action waivers, we are still seeing meaningful litigation. The basic challenges to enforcing arbitration clauses outlined below explain how class actions may persist despite a waiver in an arbitration clause:

- **Formation of the contract**: Although not inherently contracts of adhesion, any defense to contract formation is fair game in challenging an arbitration clause and a class action waiver. See *American Express Co v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). To form a bilateral contract, there must be an offer, consideration, acceptance, and then mutuality or meeting of the minds. The arbitration clause and class action waiver should be included in the offer. Attempting to bind consumers or employees *after* a basic contract has been formed, without sufficient consideration, is a basis to challenge an arbitration clause and class action waiver. Arbitration clauses and class action waivers should also be fairly presented and in a legible font.

- **Scope of the contract**: How precisely are the claims in the arbitration clause and class action waiver defined? Are all the potential claims arising under the provision of the arbitration clause? If an arbitration clause is imprecise or not sufficiently broad in scope, the arbitration clause and class action waiver may not be enforced.

- **Fee-shifting provisions**: Arbitration clauses often address the parties’ respective coverage of fees or costs. The substantive governing law may provide a basis to challenge the arbitration clause based on a fee-shifting provision or the lack of such a provision. These provisions could be a basis for arguing that an arbitration clause should not apply.

- **Pending example**: The prominent plaintiffs’ firm Leif Cabraser filed a fraud class action on behalf of a nationwide class of consumers against Fitbit, Inc. regarding complaints that the heart rate monitors are inaccurate. In that case, it appears that Fitbit provided the arbitration clauses to consumers that bought the product at a retail establishment *after* the product was purchased and only when the consumer was attempting to register the product online. See U.S. Dist. Ct. for the N. Dist. Of California, Case No. 16-cv-36. The timing of the offer, consideration, acceptance, and mutuality in these sort of transactions raises questions. See Handout 2.
CONCLUSION

A class action waiver is only as effective as the contract that creates it. Careful drafting, considering the business needs, and the relevant legal principles and laws are of crucial importance. Effectively drafted, however, arbitration clauses can limit class action litigation and keep individualized claims in arbitration. This could disincentive a trend in the plaintiffs’ bar that increasingly brings “no-injury” class action lawsuits based solely on statutory damages.
STANDING AND STATUTORY DAMAGES: SPOKEO, INC. V. ROBINS, 135 S. CT. 1892 (2015)

BACKGROUND

The Supreme Court granted Spokeo Inc.’s petition for certiorari to answer a question often pondered by constitutional scholars and of critical importance to class action practitioners: whether an individual must demonstrate an “injury in fact” beyond a defendant’s alleged violation of a statute in order to have Article III standing.

Plaintiff Thomas Robins alleged that Spokeo, Inc. violated the Fair Credit Reporting Act (“FCRA”) by publishing inaccurate information about him and then failing to provide notice to third parties as required by statute. Spokeo, Inc. operates a “people search engine,” collecting information from a wide variety of sources into a database, including phone books, real estate listings, and social media networks. Spokeo’s service allows individuals to search Spokeo’s compiled database, which can be used for credit reporting purposes and background checks. Robins alleged that the information Spokeo compiled on him was inaccurate because it included false statements, such as incorrectly quoting Robins’s age, educational background, and family status. Robins also asserted claims on behalf of a nationwide class of individuals whom would also be entitled to statutory damages for Spokeo’s alleged violation of the FCRA.

The federal district court dismissed Robins’s individual claim, concluding that he lacked standing under Article III. The district court reasoned that Robins did not point to any actual harm from Spokeo’s publication of inaccurate information about him. Although Robins alleged that he could suffer based on possible future effects of Spokeo’s reporting, the district court concluded that such allegations fell short of satisfying Article III’s standing requirements. Robins later amended his complaint to allege that Spokeo’s search results harmed his “employment prospects,” and that his continued unemployment had caused him “anxiety, stress, concern, and/or worry about his diminished employment prospects.” Initially concluding that such amended allegations were sufficient, on reconsideration, the district court dismissed the case with prejudice.

The Ninth Circuit reversed. Because Robins alleged a statutory cause of action, the Court reasoned that he was not required to show “actual harm” in the traditional sense of Article III standing analyses. The Ninth Circuit did not analyze whether Robins’s amended complaint, basing his injuries on his diminished employment prospects, were enough.

THE POTENTIAL IMPORTANCE OF THE SPOKEO DECISION

The potential implications of the Court’s upcoming ruling in Spokeo far eclipse just the FCRA. As indicated by the 17 separate amicus briefs submitted on behalf of Spokeo, class action defendants are concerned about the ramifications of the Court’s ruling on this issue. Litigation under the Telephone Consumer Protection Act, Fair Debt Collection Practices Act, Electronic Communications Privacy Act, Truth in Lending Act, and the Electronic Fund Transfer Act, to name a few, could all be impacted by the Spokeo ruling. Businesses commonly see these no-individualized-damages lawsuits immediately after a data breach is announced, and certainly before a consumer could experience any sort of particularized injury. If the Court issues a broad ruling allowing no-injury claims based solely on statutory damages, there could be dramatic implications for a variety of businesses already subject to complicated federal and state statutory schemes, and in particular, those related to privacy and data breach laws.
What should we expect?

- **The Court could reserve ruling until next term:**
  After Justice Antonin Scalia’s death on February 13, 2016, many wonder what changes may be in store for the Supreme Court’s class-action jurisprudence. Justice Scalia had a predominant voice, penning the majority opinions in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), *AT&T Mobility LLC v Concepcion*, 131 S. Ct. 1740 (2011), *American Express Co. v. Italian Colors Restaurant, et al.*, 133 S. Ct. 2304 (2013), *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). During the *Spokeo* oral argument, Justice Scalia’s questioning indicated that he may reverse the Ninth Circuit’s decision. In light of the 5-4 trend in *Wal-Mart, Concepcion, American Express, and Comcast*, the Court could be left with a 4-4 split, and choose to rehear the case next term when a new associate justice will presumably have taken the bench.

- **The Court could provide a narrow ruling:**
  If the decisions this term in *Campbell-Ewald v. Gomez* and *Tyson Foods v. Bouaphakeo* are any indication, the Court’s opinion in *Spokeo* could be limited to the facts of the case and riddled with open questions. The *Campbell-Ewald* decision left the door open to the possibility of mooting individual or class claims where a defendant transfers funds constituting complete relief to a plaintiff in conjunction with a Rule 68 offer. And although the Court in *Tyson Foods* ruled that under the relevant claims at issue and facts of the case classwide damages could be established based on statistical evidence, the Court made clear that a defendant can challenge statistically inadequate evidence, evidence based in implausible assumptions, or later challenge the method of allocation proposed for class members.

  Robins’s amended complaint in the district court did allege a prospective, future harm based on the anxiety he suffered from continued unemployment, which he attributed to Spokeo’s publication of allegedly false information. The narrowest and easiest way for the Court to kick the broader issues pending before the Court is to analyze Robins’s allegations of “future harm” and determine whether they are sufficient to establish a “substantial risk” of future injury. See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (rejecting an alleged fear of future injury that was based on an “objectively reasonably likelihood” as too speculative and relying on “a highly attenuated chain of possibilities”); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 & n.3 (2010) (analyzing constitutional standing for plaintiff seeking injunctive relief under the National Environmental Policy Act of 1969 and alleging future harm). Robins also argues that his dispute under the FCRA is itself a concrete injury because he is attempting to prove whether he is entitled to statutory damages from Spokeo. In short, there are ways for the Court to avoid the potential far-reaching implications of a ruling in Robins’s favor.

- **The Court could rule on the Article III requirements for a named class-action plaintiff:**
  Although it is not likely, the Court could permit named class action plaintiffs to bring individual and class claims based solely on a claim of statutory damages. “The Supreme Court has yet to comment on what Article III requires of putative, unnamed class members during a Rule 23 motion for class certification.” *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359-60 (3d Cir. 2015). It is unlikely the Court will address what standing requirements exist beyond those that exist for Robins as the named plaintiff for the uncertified class in *Spokeo*.
Bottom Line: The Court’s ruling in Spokeo, at the very least, will have substantial ramifications for attorneys that litigate statutory damages claims and businesses that defend against such claims. The likely outcome, however, is a ruling limited to the facts of the named plaintiff and a plain application of preexisting Article III jurisprudence.
Supreme Court of the United States

Syllabus

Director, Inc. v. Imburgia et al.

Certiorari to the Court of Appeal of California, Second Appellate District, Division One


Petitioner DIRECTV, Inc., and its customers entered into a service agreement that included a binding arbitration provision with a class-arbitration waiver. It specified that the entire arbitration provision was unenforceable if the “law of your state” made class-arbitration waivers unenforceable. The agreement also declared that the arbitration clause was governed by the Federal Arbitration Act. At the time that respondents, California residents, entered into that agreement with DIRECTV, California law made class-arbitration waivers unenforceable, see Discover Bank v. Superior Court, 36 Cal. 4th 148, 113 P. 3d 1100. This Court subsequently held in AT&T Mobility LLC v. Concepcion, 563 U. S. 333, however, that California’s Discover Bank rule was pre-empted by the Federal Arbitration Act, 9 U. S. C. §2.

When respondents sued petitioner, the trial court denied DIRECTV’s request to order the matter to arbitration, and the California Court of Appeal affirmed. The court thought that California law would render class-arbitration waivers unenforceable, so it held the entire arbitration provision was unenforceable under the agreement. The fact that the Federal Arbitration Act pre-empted that California law did not change the result, the court said, because the parties were free to refer in the contract to California law as it would have been absent federal pre-emption. The court reasoned that the phrase “law of your state” was both a specific provision that should govern more general provisions and an ambiguous provision that should be construed against the drafter. Therefore, the court held, the parties had in fact included California law as it would have been without federal pre-emption.

Held: Because the California Court of Appeal’s interpretation is pre-
emptied by the Federal Arbitration Act, that court must enforce the arbitration agreement. Pp. 5–11.

(a) No one denies that lower courts must follow Concepcion, but that elementary point of law does not resolve the case because the parties are free to choose the law governing an arbitration provision, including California law as it would have been if not pre-empted. The state court interpreted the contract to mean that the parties did so, and the interpretation of a contract is ordinarily a matter of state law to which this Court defers, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 474. The issue here is not whether the court’s decision is a correct statement of California law but whether it is consistent with the Federal Arbitration Act. Pp. 5–6.

(b) The California court’s interpretation does not place arbitration contracts “on equal footing with all other contracts,” Buckeye Check Cashing, Inc. v. Cardegna, 546 U. S. 440, 443, because California courts would not interpret contracts other than arbitration contracts the same way. Several considerations lead to this conclusion. First, the phrase “law of your state” is not ambiguous and takes its ordinary meaning: valid state law. Second, California case law—that under “general contract principles,” references to California law incorporate the California Legislature’s power to change the law retroactively, Doe v. Harris, 57 Cal. 4th 64, 69–70, 302 P. 3d 598, 601–602—clarifies any doubt about how to interpret it. Third, because the court nowhere suggests that California courts would reach the same interpretation in any other context, its conclusion appears to reflect the subject matter, rather than a general principle that would include state statutes invalidated by other federal law. Fourth, the language the court uses to frame the issue focuses only on arbitration. Fifth, the view that state law retains independent force after being authoritatively invalidated is one courts are unlikely to apply in other contexts. Sixth, none of the principles of contract interpretation relied on by the California court suggests that other California courts would reach the same interpretation elsewhere. The court applied the canon that contracts are construed against the drafter, but the lack of any similar case interpreting similar language to include invalid laws indicates that the antidrafter canon would not lead California courts to reach a similar conclusion in cases not involving arbitration. Pp. 6–10.

225 Cal. App. 4th 338, 170 Cal. Rptr. 3d 190, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.
Justice Breyer delivered the opinion of the Court.

The Federal Arbitration Act states that a “written provision” in a contract providing for “settlement by arbitration” of “a controversy . . . arising out of” that “contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. We here consider a California court’s refusal to enforce an arbitration provision in a contract. In our view, that decision does not rest “upon such grounds as exist . . . for the revocation of any contract,” and we consequently set that judgment aside.

I

DIRECTV, Inc., the petitioner, entered into a service agreement with its customers, including respondents Amy Imburgia and Kathy Greiner. Section 9 of that contract provides that “any Claim either of us asserts will be resolved only by binding arbitration.” App. 128. It then sets forth a waiver of class arbitration, stating that “[n]either you nor we shall be entitled to join or consolidate claims in arbitration.” Id., at 128–129. It adds that if the “law of your state” makes the waiver of class arbitration unen-
forceable, then the entire arbitration provision “is unenforceable.” *Id.*, at 129. Section 10 of the contract states that §9, the arbitration provision, “shall be governed by the Federal Arbitration Act.” *Ibid.*

In 2008, the two respondents brought this lawsuit against DIRECTV in a California state court. They seek damages for early termination fees that they believe violate California law. After various proceedings not here relevant, DIRECTV, pointing to the arbitration provision, asked the court to send the matter to arbitration. The state trial court denied that request, and DIRECTV appealed.

The California Court of Appeal thought that the critical legal question concerned the meaning of the contractual phrase “law of your state,” in this case the law of California. Does the law of California make the contract’s class-arbitration waiver unenforceable? If so, as the contract provides, the entire arbitration provision is unenforceable. Or does California law permit the parties to agree to waive the right to proceed as a class in arbitration? If so, the arbitration provision is enforceable.

At one point, the law of California would have made the contract’s class-arbitration waiver unenforceable. In 2005, the California Supreme Court held in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162–163, 113 P. 3d 1100, 1110, that a “waiver” of class arbitration in a “consumer contract of adhesion” that “predictably involve[s] small amounts of damages” and meets certain other criteria not contested here is “unconscionable under California law and should not be enforced.” See *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1446–1447, 48 Cal. Rptr. 3d 813, 815–816 (2006) (holding a class-action waiver similar to the one at issue here unenforceable pursuant to *Discover Bank*); see also Consumers Legal Remedies Act, Cal. Civ. Code Ann. §§1751, 1781(a) (West 2009) (invalidating class-action waivers for claims brought under that statute). But

The California Court of Appeal subsequently held in this case that, despite this Court’s holding in Concepcion, “the law of California would find the class action waiver unenforceable.” 225 Cal. App. 4th 338, 342, 170 Cal. Rptr. 3d 190, 194 (2014). The court noted that Discover Bank had held agreements to dispense with class-arbitration procedures unenforceable under circumstances such as these. 225 Cal. App. 4th, at 341, 170 Cal. Rptr. 3d, at 194. It conceded that this Court in Concepcion had held that the Federal Arbitration Act invalidated California’s rule. 225 Cal. App. 4th, at 341, 170 Cal. Rptr. 3d, at 194. But it then concluded that this latter circumstance did not change the result—that the “class action waiver is unenforceable under California law.” Id., at 347, 170 Cal. Rptr. 3d, at 198.

In reaching that conclusion, the Court of Appeal referred to two sections of California’s Consumers Legal Remedies Act, §§1751, 1781(a), rather than Discover Bank itself. See 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. Section 1751 renders invalid any waiver of the right under §1781(a) to bring a class action for violations of that Act. The Court of Appeal thought that applying “state law alone” (that is, those two sections) would render unenforceable the class-arbitration waiver in §9 of the contract.
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Id., at 344, 170 Cal. Rptr. 3d, at 195. But it nonetheless recognized that if it applied federal law “then the class action waiver is enforceable and any state law to the contrary is preempted.” Ibid. As far as those sections apply to class-arbitration waivers, they embody the Discover Bank rule. The California Supreme Court has recognized as much, see Sanchez, supra, at 923–924, 353 P. 3d, at 757, and no party argues to the contrary. See Supp. Brief for Respondents 2 (“The ruling in Sanchez tracks respondents’ position precisely”). We shall consequently refer to the here-relevant rule as the Discover Bank rule.

The court reasoned that just as the parties were free in their contract to refer to the laws of different States or different nations, so too were they free to refer to California law as it would have been without this Court’s holding invalidating the Discover Bank rule. The court thought that the parties in their contract had done just that. And it set forth two reasons for believing so.

First, §10 of the contract, stating that the Federal Arbitration Act governs §9 (the arbitration provision), is a general provision. But the provision voiding arbitration if the “law of your state” would find the class-arbitration waiver unenforceable is a specific provision. The court believed that the specific provision “‘is paramount to’” and must govern the general. 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195 (quoting Prouty v. Gores Technology Group, 121 Cal. App. 4th 1225, 1235, 18 Cal. Rptr. 3d 178, 185–186 (2004); brackets omitted).

Second, the court said that “‘a court should construe ambiguous language against the interest of the party that drafted it.’” 255 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U. S. 52, 62 (1995)). DIRECTV had drafted the language; to void the arbitration provision was against its interest. Hence the arbitration provision was void. The
Court of Appeal consequently affirmed the trial court’s denial of DIRECTV’s motion to enforce the arbitration provision.

The California Supreme Court denied discretionary review. App. to Pet. for Cert. 1a. DIRECTV then filed a petition for a writ of certiorari, noting that the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal. *Murphy v. DirecTV, Inc.*, 724 F. 3d 1218, 1226–1228 (2013). We granted the petition.

II

No one denies that lower courts must follow this Court’s holding in *Concepcion*. The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Lower court judges are certainly free to note their disagreement with a decision of this Court. But the “Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” *Howlett v. Rose*, 496 U. S. 356, 371 (1990); cf. *Khan v. State Oil Co.*, 93 F. 3d 1358, 1363–1364 (CA7 1996), vacated, 522 U. S. 3 (1997). The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U. S. Const., Art. VI, cl. 2 (“[T]he Judges in every State shall be bound” by “the Laws of the United States”).

While all accept this elementary point of law, that point does not resolve the issue in this case. As the Court of Appeal noted, the Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver. 225 Cal. App. 4th, at 342–343, 170 Cal. Rptr. 3d,
at 194. In principle, they might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* rule and irrespective of that rule’s invalidation in *Concepcion*. The Court of Appeal decided that, as a matter of contract law, the parties did mean the phrase “law of your state” to refer to this last possibility. Since the interpretation of a contract is ordinarily a matter of state law to which we defer, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989), we must decide not whether its decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.

III

Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law. While recognizing this, we must decide whether the decision of the California court places arbitration contracts “on equal footing with all other contracts.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440, 443 (2006). And in doing so, we must examine whether the Court of Appeal’s decision in fact rests upon “grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. That is to say, we look not to grounds that the California court might have offered but rather to those it did in fact offer. Neither this approach nor our result “steps beyond *Concepcion*” or any other aspect of federal arbitration law. See *post*, at 9 (GINSBURG, J., dissenting) (hereinafter the dissent).

We recognize, as the dissent points out, *post*, at 4, that when DIRECTV drafted the contract, the parties likely believed that the words “law of your state” included California law that then made class-arbitration waivers unen-
forceable. But that does not answer the legal question before us. That is because this Court subsequently held in *Concepcion* that the *Discover Bank* rule was invalid. Thus the underlying question of contract law at the time the Court of Appeal made its decision was whether the “law of your state” included *invalid* California law. We must now decide whether answering *that* question in the affirmative is consistent with the Federal Arbitration Act. After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way. Rather, several considerations lead us to conclude that the court’s interpretation of this arbitration contract is unique, restricted to that field.

First, we do not believe that the relevant contract language is ambiguous. The contract says that “[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [the arbitration section] is unenforceable.” App. 129. Absent any indication in the contract that this language is meant to refer to *invalid* state law, it presumably takes its ordinary meaning: *valid* state law. Indeed, neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid. While we recognize that the dissent believes this phrase to be “ambiguous,” *post*, at 7, 9, or “anomalous,” *post*, at 10, we cannot agree with that characterization.

Second, California case law itself clarifies any doubt about how to interpret the language. The California Supreme Court has held that under “general contract principles,” references to California law incorporate the California Legislature’s power to change the law retroactively. See *Doe v. Harris*, 57 Cal. 4th 64, 69–70, 302 P. 3d 598, 601–602 (2013) (holding that plea agreements, which
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are governed by general contract principles, are “‘deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws’” (quoting People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478, 481 (2004))). And judicial construction of a statute ordinarily applies retroactively. Rivers v. Roadway Express, Inc., 511 U. S. 298, 312–313 (1994). As far as we are aware, the principle of California law announced in Harris, not the Court of Appeal’s decision here, would ordinarily govern the scope of phrases such as “law of your state.”

Third, nothing in the Court of Appeal’s reasoning suggests that a California court would reach the same interpretation of “law of your state” in any context other than arbitration. The Court of Appeal did not explain why parties might generally intend the words “law of your state” to encompass “invalid law of your state.” To the contrary, the contract refers to “state law” that makes the waiver of class arbitration “unenforceable,” while an invalid state law would not make a contractual provision unenforceable. Assuming—as we must—that the court’s reasoning is a correct statement as to the meaning of “law of your state” in this arbitration provision, we can find nothing in that opinion (nor in any other California case) suggesting that California would generally interpret words such as “law of your state” to include state laws held invalid because they conflict with, say, federal labor statutes, federal pension statutes, federal antidiscrimination laws, the Equal Protection Clause, or the like. Even given our assumption that the Court of Appeal’s conclusion is correct, its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts using similar language but involving state statutes invalidated by other federal law.

Fourth, the language used by the Court of Appeal fo-
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cused only on arbitration. The court asked whether “law of your state” “mean[s] ‘the law of your state to the extent it is not preempted by the [Federal Arbitration Act],’ or ‘the law of your state without considering the preemptive effect, if any of the [Federal Arbitration Act].’” 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. Framing the question in such terms, rather than in generally applicable terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration.

Fifth, the Court of Appeal reasoned that invalid state arbitration law, namely the Discover Bank rule, maintained legal force despite this Court’s holding in Concepcion. The court stated that “[i]f we apply state law alone . . . to the class action waiver, then the waiver is unenforceable.” 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. And at the end of its opinion it reiterated that “[t]he class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable.” Id., at 347, 170 Cal. Rptr. 3d, at 198. But those statements do not describe California law. See Concepcion, 563 U. S., at 344, 352; Sanchez, 61 Cal. 4th, at 923–924, 353 P. 3d, at 757. The view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts.

Sixth, there is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation of the words “law of your state” in other contexts. The court said that the phrase “law of your state” constitutes “a specific exception” to the agreement’s “general adoption of the [Federal Arbitration Act].”’ 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. But that tells us nothing about how to interpret the words “law of your state” elsewhere. It does not answer the relevant question: whether those words encompass laws
that have been authoritatively held invalid. Cf. Prouty, 121 Cal. App. 4th, at 1235, 18 Cal. Rptr. 3d, at 185–186 (specific words govern only “when a general and a particular provision are inconsistent”).

The court added that it would interpret “‘ambiguous language against the interest of the party that drafted it,’” namely DIRECTV. 225 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (quoting Mastrobuono, 514 U. S., at 62). The dissent adopts a similar argument. See post, at 7–9. But, as we have pointed out, supra, at 8, were the phrase “law of your state” ambiguous, surely some court would have construed that term to incorporate state laws invalidated by, for example, federal labor law, federal pension law, or federal civil rights law. Yet, we have found no such case. Moreover, the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was. The fact that we can find no similar case interpreting the words “law of your state” to include invalid state laws indicates, at the least, that the antidrafter canon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.

* * *

Taking these considerations together, we reach a conclusion that, in our view, falls well within the confines of (and goes no further than) present well-established law. California’s interpretation of the phrase “law of your state” does not place arbitration contracts “on equal footing with all other contracts,” Buckeye Check Cashing, Inc., 546 U. S., at 443. For that reason, it does not give “due regard . . . to the federal policy favoring arbitration.” Volt Information Sciences, 489 U. S., at 476. Thus, the Court of Appeal’s interpretation is pre-empted by the Federal Arbitration Act. See Perry v. Thomas, 482 U. S. 483, 493, n. 9 (1987) (noting that the Federal Arbitration Act pre-
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empts decisions that take their “meaning precisely from the fact that a contract to arbitrate is at issue”). Hence, the California Court of Appeal must “enforc[e]” the arbitration agreement. 9 U. S. C. §2.

The judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.
THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 14–462

DIRECTV, INC., PETITIONER v. AMY IMBURGIA, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[December 14, 2015]

JUSTICE THOMAS, dissenting.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

It has become routine, in a large part due to this Court’s decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses. The form contract in this case contains a Delphic provision stating that “if the law of your state” does not permit agreements barring class arbitration, then the entire agreement to arbitrate becomes unenforceable, freeing the aggrieved customer to commence class-based litigation in court. This Court reads that provision in a manner most protective of the drafting enterprise. I would read it, as the California court did, to give the customer, not the drafter, the benefit of the doubt. Acknowledging the precedent so far set by the Court, I would take no further step to disarm consumers, leaving them without effective access to justice.

I

This case began as a putative class action in state court claiming that DIRECTV, by imposing hefty early-termination fees, violated California consumer-protective legislation, including the Consumers Legal Remedies Act (CLRA), Cal. Civ. Code Ann. §1750 et seq. (West 2015). App. 58. DIRECTV did not initially seek to stop the law-
suit and compel bilateral arbitration. See id., at 52–53. The reason for DIRECTV’s failure to oppose the litigation is no mystery. The version of DIRECTV’s service agreement applicable in this case (the 2007 version) requires consumers to arbitrate all disputes and to forgo class arbitration. Id., at 128–129. If the relevant provision stopped there, the Court’s recent precedent, see American Express Co. v. Italian Colors Restaurant, 570 U. S. ___ (2013); AT&T Mobility LLC v. Concepcion, 563 U. S. 333 (2011), would control, and DIRECTV could have resisted the lawsuit. But DIRECTV’s form contract continued: The entire arbitration clause is unenforceable “[i]f . . . the law of your state would find” unenforceable the agreement’s class-arbitration prohibition. App. 129. At the time plaintiff-respondents Imburgia and Greiner commenced their court action, class-arbitration bars like the one in DIRECTV’s agreement were per se unenforceable as unconscionable under the law of California. See Discover Bank v. Superior Court, 36 Cal. 4th 148, 162–163, 113 P. 3d 1100, 1110 (2005).

Nearly three years into the litigation, this Court held in Concepcion, 563 U. S., at 338–351, that the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq., preempts state rules that render class-arbitration bans unenforceable. DIRECTV then moved to halt the long-pending lawsuit and compel bilateral arbitration. App. to Pet. for Cert. 4a. The California Superior Court denied DIRECTV’s motion, No. BC398295 (Super. Ct. Los Angeles Cty., Cal., Jan. 26, 2012), App. to Pet. for Cert. 17a–20a, and the California Court of Appeal affirmed. The Court of Appeal first observed that, under the California law DIRECTV confronted when it drafted the clause in question, provisions relinquishing the right to proceed under the CLRA on behalf of a class would not be enforced. 225 Cal. App. 4th 338, 342, 170 Cal. Rptr. 3d 190, 194 (2014). The question dispositive of DIRECTV’s motion, the California court
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explained, trains on the meaning of the atypical contractual phrase “the law of your state”: “does it mean ‘the law of your state to the extent it is not preempted by the FAA,’ or ‘the law of your state without considering the preemptive effect, if any, of the FAA?’”  Id., at 344, 170 Cal. Rptr. 3d, at 195.

In resolving this question, the California court emphasized that DIRECTV drafted the service agreement, giving its customers no say in the matter, and reserving to itself the right to modify the agreement unilaterally at any time.  Id., at 345, 170 Cal. Rptr. 3d, at 196.  See also Brief for Respondents 1–2.  DIRECTV used the same take-it-or-leave-it contract everywhere it did business.  Ibid. “[T]o protect the party who did not choose the language from an unintended or unfair result,” the California court applied “the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.”  225 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62–63 (1995)). That rule was particularly appropriate in this case, the court reasoned, for, “as a practical matter, it seems unlikely that plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts” state-law protection against compelled class-arbitration waivers.  255 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (internal quotation marks omitted).

II

The Court today holds that the California Court of Appeal interpreted the language in DIRECTV’s service agreement so unreasonably as to suggest discrimination against arbitration in violation of the FAA.  Ante, at 8. As I see it, the California court’s interpretation of the “law of your state” provision is not only reasonable, it is entirely right.
Arbitration is a matter of “consent, not coercion.” Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp., 559 U. S. 662, 681 (2010) (internal quotation marks omitted). The FAA “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 478 (1989). “[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.” Id., at 474. See also First Options of Chicago, Inc. v. Kaplan, 514 U. S. 938, 944 (1995) (when interpreting arbitration agreements, courts “should apply ordinary state-law principles that govern the formation of contracts”). Historically, this Court has respected state-court interpretations of arbitration agreements. See Mastrobuono, 514 U. S., at 60, n. 4; Volt Information Sciences, 489 U. S., at 484. Indeed, in the more than 25 years between Volt Information Sciences and this case, not once has this Court reversed a state-court decision on the ground that the state court misapplied state contract law when it determined the meaning of a term in a particular arbitration agreement. Today’s decision is a dangerous first.

Beyond genuine debate, DIRECTV originally meant the “law of your state” clause to refer to its customer’s home state law untouched by federal preemption. As DIRECTV explained in a state-court filing, the clause prevented enforcement of the arbitration agreement in those States, California among them, where the class-arbitration prescription was unenforceable as a matter of state law, while requiring bilateral arbitration in States that did not outlaw purported waivers of class proceedings. App. 52 (“The Customer Agreement between DIRECTV and its customers provides that the customer’s home state laws will govern the relationship, and that any disputes will be resolved in individual arbitration if the customer’s home
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state laws enforce the parties’ arbitration agreement.” (emphasis added)).

According to DIRECTV, because the class-arbitration ban, post-Concepcion, is enforceable in all States, this case must now be resolved, if at all, in bilateral arbitration. The Court agrees. After Concepcion, the Court maintains, it no longer matters whether DIRECTV meant California’s “home state laws” when it drafted the 2007 version of its service agreement. But Concepcion held only that a State cannot compel a party to engage in class arbitration when the controlling agreement unconditionally prohibits class procedures. See 563 U. S., at 351 (“Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations,” so parties may consent to class procedures even though such procedures “may not be required by state law.”). Just as a contract itself may provide for class arbitration, so the parties may choose to be bound by a particular state law, in this case, the CLRA, even if the FAA would otherwise displace that state law. Hall Street Associates, L. L. C. v. Mattel, Inc., 552 U. S. 576, 586 (2008) (“[T]he FAA lets parties tailor some, even many, features of arbitration by contract, including . . . procedure and choice of substantive law.”). 1 “In principle,” the Court acknowledges, parties “might choose to have portions of their contract governed by the law of Tibet, [or] the law of pre-revolutionary Russia.” Ante, at 6; see Brief for Petitioner 20 (observing that the FAA would allow parties “to

1 FAA preemption is distinct from federal preemption in other contexts. Unlike “state laws invalidated by, for example, federal labor law, federal pension law, or federal civil rights law,” ante, at 10, state laws are preempted by the FAA only to the extent that they conflict with the contracting parties’ intent. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U. S. 52, 59 (1995) (“[I]n the absence of contractual intent to the contrary, the FAA would pre-empt” a particular state law. (emphasis added)); Brief for Law Professors as Amicus Curiae 10 (“FAA preemption cannot occur without reference to a particular agreement of the parties. . . .”).
bind themselves by reference to the rules of a board game"). Pre-revolutionary Russian law, but not California’s “home state laws” operative and unquestionably valid in 2007? Makes little sense to me.

Nothing in Concepcion or the FAA nullifies provisions of the CLRA. They hold sway when parties elect judicial resolution of their disputes, and should similarly control when parties choose that consumer-protective law to govern their arbitration agreements. See Volt Information Sciences, 489 U. S., at 475 (where parties had “incorporat[ed] . . . California rules of arbitration into their agreement,” they had “no FAA-guaranteed right to compel arbitration” on terms inconsistent with those California rules). Thus, even after Concepcion, one could properly refer to the CLRA’s class-waiver proscription as “California law.” To repeat, the dispositive question in this case is whether the parties intended the “law of your state” provision to mean state law as preempted by federal law, as the Court today reads the provision, or home state law as framed by the California Legislature, without considering the preemptive effect of federal law, as the California court read it.

The latter reading is the better one. DIRECTV had no occasion to refer to “the law of [its customer’s] state” had it meant to incorporate state law as preempted by the FAA. That is, DIRECTV, like virtually every other company with a similar service agreement, could have employed a

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2 The Court refers to the relevant California law as the “Discover Bank rule” and suggests that, “under ‘general contract principles,’ references to California law incorporate the California Legislature’s power to change the law retroactively.” Ante, at 7. But despite this Court’s rejection of the Discover Bank rule in Concepcion, the California Legislature has not capitulated; it has retained without change the CLRA’s class-waiver prohibition. The Discover Bank rule relied on an interpretation of the FAA, see 36 Cal. 4th 148, 162–173, 113 P. 3d 1100, 1100–1117 (2005); in contrast, the CLRA’s class-waiver proscription reflects California’s legislative policy judgment.
clause directly conditioning enforceability of the arbitration agreement on the exclusion of class arbitration. Indeed, DIRECTV has done just that in service agreements both before and after 2007. App. 121 (the 2004 version provides that “[a] Court may sever any portion of [the arbitration agreement] that it finds to be unenforceable, except for the prohibition on class or representative arbitration”); Brief for Respondents 35–36 (stating that the June 2015 version of DIRECTV’s agreement provides that “[a] court may sever any portion of [the arbitration agreement] that it finds to be unenforceable, except for the prohibition on [class arbitration]” (internal quotation marks omitted)). Had DIRECTV followed this pattern in its 2007 form contract, the arbitration agreement, post-Concepcion, unquestionably would have been enforceable in all States. In the 2007 version, however, DIRECTV chose a different formulation, one referring to the “law of [its customer’s] state.” I would not translate that term to be synonymous with “federal law.” If DIRECTV meant to exclude the application of California legislation, it surely chose a bizarre way to accomplish that result.

As earlier noted, see supra, at 3, and as the California court appreciated, courts generally construe ambiguous contractual terms against the drafter. See Mastrobuono, 514 U.S., at 63 (“Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt.”). This “common-law rule of contract interpretation,” id., at 62, reflects the principle that a party should not be permitted to write an ambiguous term, lock another party into agreeing to that term, and then reap the benefit of the ambiguity once a dispute emerges. The rule has particular force where, as here, a court is interpreting a “standardized contrac[t]” that was not the product of bilateral bargaining. Restatement (Second) of Contracts §206, Comment a (1979).

Allowing DIRECTV to reap the benefit of an ambiguity
it could have avoided would ignore not just the hugely unequal bargaining power of the parties, but also their reasonable expectations at the time the contract was formed. See *Mastrobuono*, 514 U. S., at 63 (it is particularly appropriate to construe terms against the drafter where the other party had no reason to anticipate or intend the drafter’s preferred result). See also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U. S. 243, 262 (1984) ("[C]ontract[s] . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the [parties] thereby contracting." (quoting *Rocca v. Thompson*, 223 U. S. 317, 331–332 (1912); ellipsis in original)). At the time DIRECTV imposed this agreement on its customers, it assumed that the arbitration clause would be unenforceable in California. App. 52 (explaining in state-court filing that, “[b]ecause California law would not enforce the arbitration agreement . . ., DIRECTV has not sought and will not seek to arbitrate disputes with California customers”). Likewise, any California customer who read the agreement would scarcely have understood that she had submitted to bilateral arbitration of any and all disputes with DIRECTV. She certainly would have had no reason to anticipate the Court’s decision in *Concepcion*, rendered four years later, or to consider whether “law of your state” is a chameleon term meaning California legislation when she received her service contract, but preemptive federal law later on.

DIRECTV primarily responds that the FAA requires construction of all terms in arbitration agreements in favor of arbitrability. True, this Court has found in the FAA a “federal policy favoring arbitration.” *Ante*, at 10 (quoting *Volt Information Sciences*, 489 U. S., at 476). But the Court has also cautioned that an arbitration-favoring presumption applies “only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a
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particular dispute is what the parties intended because their express agreement to arbitrate was validly formed[,] is legally enforceable[,] and is best construed to encompass the dispute.” Granite Rock Co. v. Teamsters, 561 U. S. 287, 303 (2010). DIRECTV acknowledges that “[t]his case . . . involves a threshold dispute over the enforceability of the parties’ arbitration agreement” in its entirety. Reply Brief 7. Like the California court, I would resolve that dispute by employing traditional rules of contract interpretation sans any arbitration-favoring presumption, including the rule that ambiguous language should be construed against the drafter. See supra, at 3, 7.

III

Today’s decision steps beyond Concepcion and Italian Colors. There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts. In Concepcion, 563 U. S., at 336, customers brought a class action claiming that AT&T Mobility had improperly charged $30.22 in sales tax while advertising cellular telephones as free. AT&T Mobility’s form consumer contract contained a mandatory arbitration clause and a class-arbitration proscription. Because consumers lacked input into the contractual terms, and because few rational consumers would go through the hassle of pursuing a $30.22 claim in bilateral arbitration, the California courts deemed the arbitration agreement unenforceable as unconscionable. See id., at 365 (BREYER, J., dissenting) (“[T]he maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.”) (quoting Laster v. AT&T Mobility LLC, 584 F. 3d 849, 856 (CA9 2009)); Carnegie v. Household Int’l, Inc., 376 F. 3d 656, 661 (CA7 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a luna-
tic or a fanatic sues for $30,"), cert. denied, 543 U. S. 1051 (2005). Nonetheless, the Court held that the FAA mandated enforcement of the entire arbitration agreement, including the class-arbitration ban. *Concepcion*, 563 U. S., at 343. Two years later, in *Italian Colors*, 570 U. S., at ___ (slip op., at 5), the Court reaffirmed that class-arbitration prohibitions are enforceable even where claimants “have no economic incentive to pursue their . . . claims individually in arbitration.” Today, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights.3

3It has not always been this way. In *Wilko v. Swan*, 346 U. S. 427, 435, 438 (1953), the Court unanimously held that an arbitration clause in a brokerage agreement was unenforceable. The Court noted that the Securities Act was “drafted with an eye to the disadvantages under which buyers labor” when negotiating brokerage agreements, id., at 435, and described arbitration as less protective of the rights of stock buyers than litigation, id., at 435–437. The Court later overruled *Wilko*, rejecting what it described as *Wilko*’s “suspicion of arbitration as a method of weakening the protections afforded in the substantive law.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 481 (1989). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 33 (1991) (relying on *Rodriguez de Quijas* to conclude that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”). Similarly, before *Italian Colors*, the Court had suggested that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,” and when that is so, an arbitration agreement may be unenforceable. *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U. S. 79, 90 (2000). Although the Court in *Italian Colors* did not expressly reject this “effective vindication” principle, the Court’s refusal to apply the principle in that case suggests that the principle will no longer apply in any case. See 570 U. S., at ___ (slip op., at 15) (KAGAN, J., dissenting); *CompuCredit Corp. v. Greenwood*, 565 U. S. ___, ____ (2012) (GINSBURG, J., dissenting) (slip op., at 1–2) (criticizing the Court
These decisions have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws. See N. Y. Times, Nov. 1, 2015, p. A1, col. 5 (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”). Studies confirm that hardly any consumers take advantage of bilateral arbitration to pursue small-dollar claims. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2900–2910 (2015) (Resnik, Diffusing Disputes). Because consumers lack bargaining power to change the terms of consumer adhesion contracts \textit{ex ante}, “[t]he providers [have] won the power to impose a mandatory, no-opt-out system in their own private ‘courts’ designed to preclude aggregate litigation.” Resnik, Fairness in Numbers: A Comment on \textit{AT&T} v. \textit{Concepcion}, \textit{Wal-Mart} v. \textit{Dukes}, and \textit{Turner} v. \textit{Rogers}, 125 Harv. L. Rev. 78, 133 (2011). See also Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N. Y. U. L. Rev. 286, 323 (2013) (“[P]owerful economic entities can impose no-class-action-arbitration clauses on people with little or no bargaining position—through adhesion contracts involving securities accounts, credit cards, mobile phones, car rentals, and many other social amenities and necessities.”). \footnote{The Consumer Financial Protection Bureau recently published a for ignoring a federal statutory “right to sue” and for holding “that credit repair organizations can escape suit by providing in their take-it-or-leave-it contracts that arbitration will serve as the parties’ sole dispute-resolution mechanism”).}
The proliferation of take-it-or-leave-it agreements mandating arbitration and banning class procedures, and this Court’s readiness to enforce such one-sided agreements, have disabled consumers from “shop[ping] to avoid arbitration mandates.” Resnik, Diffusing Disputes 2839. See also id., at 2872 (“[T]he numbers of clauses mandating arbitration are soaring across many sectors.”).

The Court has suggested that these anticonsumer outcomes flow inexorably from the text and purpose of the FAA. But Congress passed the FAA in 1925 as a response to the reluctance of some judges to enforce commercial arbitration agreements between merchants with relatively equal bargaining power. Moses, Arbitration Law: Who’s in Charge? 40 Seton Hall L. Rev. 147, 170–171 (2010). See also id., at 170 (contract disputes between merchants have been a proper subject of arbitration since the 1600’s). The FAA’s purpose was to “make the contracting party live up to his agreement.” H. R. Rep. No. 68–96, at 1 (1924). See also Moses, supra, at 147 (Congress sought to “provide federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases.”). Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place. See Resnik, Diffusing Disputes 2860 (“The merchants and lawyers who forged the public law of arbitration in the United States sought federal legislation to enforce consensual agreements.”) (emphasis added).

Nor does the text of the FAA compel this result. Section 2, on which the Court relied in Concepcion, Italian Colors,
and this case, prescribes simply that arbitration provisions are to be treated the same as other contractual terms: “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. As Justice O’Connor observed when the Court was just beginning to transform the FAA into what it has become, “the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.” Allied-Bruce Terminix Cos. v. Dobson, 513 U. S. 265, 283 (1995) (concurring opinion). See also Miller, supra, at 324 (“[O]ver the years the Act has been transformed by the Supreme Court through constant expansion into an expression of a ‘federal policy’ favoring arbitration, whether it involves a bilateral business dispute or not.”).

The Court’s ever-larger expansion of the FAA’s scope contrasts sharply with how other countries treat mandatory arbitration clauses in consumer contracts of adhesion. A 1993 European Union Directive forbids binding consumers to unfair contractual terms, defined as those “not . . . individually negotiated” that “cause[e] a significant imbalance in the parties’ rights and obligations . . . to the detriment of the consumer.” Coun. Directive 93/13, Art. 3, 1993 O. J. (L. 95) 31. A subsequent EU Recommendation interpreted this Directive to bar enforcement of one-party-dictated mandatory consumer arbitration agreements. Comm’n Recommendation 98/257, 1998 O. J. (L. 115) 34 (“The consumer’s recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.”). As a result of this Directive and Recommendation,
disputes between providers and consumers in the EU are arbitrated only when the parties mutually agree to arbitration on a “post-dispute basis.” Sternlight, Is the U. S. Out on a Limb? Comparing the U. S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World, 56 U. Miami L. Rev. 831, 847–848 (2002) (emphasis deleted); see id., at 852 (enforcement of mandatory arbitration clauses in consumer contracts of adhesion “is quite rare, if not nonexistent,” outside the United States).

* * *

The California Court of Appeal appropriately applied traditional tools of state contract law to interpret DIRECTV’s reference to the home state laws of its customers. Demeaning that court’s judgment through harsh construction, this Court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts. I resist the Court’s bent, and would affirm the judgment of the California Court of Appeal.
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KATE MCLELLAN, TERESA BLACK, and
DAVID URBAN, Individually and on Behalf
of All Others Similarly Situated,

v.

FITBIT, INC.,

Defendant.

Case No.  16-cv-36

CLASS ACTION

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL
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INTRODUCTION

1. In widespread national advertising—including, for example, commercials run repeatedly during Major League Baseball’s nationally-televised 2015 World Series—defendant Fitbit, Inc. (“Fitbit”) touted the purported ability of its wrist-based “activity trackers” to accurately record a wearer’s heart rate during intense physical activity. To perform this function, Fitbit equipped its “Charge HR” and “Surge” fitness watches (the “PurePulse Trackers”) with an LED-based technology called “PurePulse™”.

2. Fitbit’s representation is repeated in and echoed throughout its advertising of the PurePulse Trackers, which employs such descriptive slogans as “Every Beat Counts” and “Know Your Heart.” But the representation is false. Far from “counting every beat,” the PurePulse Trackers do not and cannot consistently and accurately record wearers’ heart rates during the intense physical activity for which Fitbit expressly markets them.

3. Plaintiffs and many consumers like them have experienced—and testing confirms—that the PurePulse Trackers consistently mis-record heart rates by a very significant margin, particularly during exercise (described herein as the “Heart Rate Defect”).

4. This failure did not keep Fitbit from heavily promoting the heart rate monitoring feature of the PurePulse Trackers and from profiting handsomely from it. In so doing, Fitbit defrauded the public and cheated its customers, including Plaintiffs.

5. The heart rate monitoring function of the PurePulse Trackers is a material—indeed, in some cases, vital—feature of the product. Not only are accurate heart readings important for all of those engaging in fitness, they are critical to the health and well-being of those Class members whose medical conditions require them to maintain (or not to exceed) a certain heart rate.

6. On behalf of all those who purchased the Fitbit PurePulse Trackers, Plaintiffs Kate McLellan, Teresa Black, and David Urban bring this action on behalf of themselves and all

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1 Available at https://www.youtube.com/watch?v=vpdHMyykJxw (last viewed December 1, 2015).
2 According to reports, in March 2016, Fitbit will be replacing the Charge HR with the “Blaze” model, which employs the same PurePulse technology.
those similarly situated to seek redress through this proposed class action in the form of injunctive relief, damages, restitution, and all other relief this Court deems equitable.

7. While Fitbit purports to bind all purchasers of its products to an arbitration agreement and class action ban, its method of doing so fails as a matter of law and, in itself, constitutes an unfair and deceptive trade practice.

8. Fitbit sells the PurePulse Trackers through its own website and through many third party online and brick and mortar stores. While Fitbit’s own website requires purchasers to agree to be bound by the arbitration clause and class action ban, third party websites and brick and mortar stores do not require any such agreement in advance or at the time of purchase, or give any indication that such agreement will later be required.

9. Instead, Fitbit includes inside the box an instruction that requires purchasers (post-purchase) to visit its website and register the PurePulse Tracker online. Such registration is required for the PurePulse Trackers to work. In an affidavit submitted in other litigation, Fitbit admitted that “[a] Fitbit user cannot use their [PurePulse Trackers] as intended until the user has set up an [online] account. In fact, the Charge HR cannot even be used as a watch until the device is first paired to a Fitbit account, which requires the user to agree to the Terms of Service.” (Brickman v. Fitbit, Inc., No. 3:15-cv-2077, Doc. 41 at ¶4 (N.D. Cal. Sept. 30, 2015)).

10. Remarkably, Fitbit purports to bind anyone who even visits its website to its arbitration agreement, whether they purchase or register any product at all.3 Indeed, if the reader of this Complaint visits the link provided in the footnote below, she or he is now deemed by Fitbit to have agreed to arbitration and a class action ban.

11. Fitbit’s attempt to bind customers who bought PurePulse Trackers through third party online and brick and mortar stores to an arbitration clause and class action ban post-purchase when they register the product—which is required to make the product function as

3 The Terms of Service provide: “You must accept these Terms to create a Fitbit account and to use the Fitbit Service. If you do not have an account, you accept these Terms by visiting www.fitbit.com or using any part of the Fitbit Service. IF YOU DO NOT ACCEPT THESE TERMS, DO NOT CREATE AN ACCOUNT, VISIT WWW.FITBIT.COM OR USE THE FITBIT SERVICE.” Available at https://www.fitbit.com/au/terms (last visited December 21, 2015). Of course, by the time one reads the Terms of Service, he or she has already visited Fitbit.com and, per Fitbit, already surrendered his or her Constitutional right to a jury trial.
intended—is unconscionable, invalid, and unenforceable. It is also an unfair and deceptive trade practice in its own right.

JURISDICTION AND VENUE

12. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because many members of the proposed Plaintiff Class, including some named plaintiffs, are citizens of states different from Fitbit’s home states, and the aggregate amount in controversy exceeds $5,000,000.00, exclusive of interest and costs.

13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because (1) the only defendant in this action resides in this District and (2) a substantial part of the events and omissions giving rise to Plaintiffs’ claims occurred in this District—specifically, Fitbit designed and marketed its product from its headquarters in San Francisco, California, and some Class members reside in and purchased their PurePulse Trackers in this District.

INTRADISTRICT ASSIGNMENT

Pursuant to Local Rule 3-2(c), this civil action should be assigned to the San Francisco Division, because a substantial part of the events or omissions giving rise to the claim occurred in the county of San Francisco, where Fitbit is headquartered.

PARTIES

Plaintiffs

14. Plaintiff KATE MCLELLAN is a California citizen and resident domiciled in Murrieta, California. She holds a PhD in rehabilitation science and currently performs research for a clinical research group. In early 2015, Plaintiff McLellan was in the market for a heart rate monitor to help her track her fitness goals. At that time, she saw Fitbit’s advertisements on Hulu, which depicted users receiving consistent, real-time, accurate heart rate readings from their PurePulse Trackers. Relying on those representations, Plaintiff McLellan purchased a Charge HR at Sports Chalet in Temecula, California on February 27, 2015, for $161.94 after tax. At no point before or during the purchase of her Charge HR was Plaintiff McLellan provided with or required to agree to an arbitration clause or class action ban, nor was she put on notice that she would be required to agree to an arbitration clause or class action ban for her Charge HR
to function as intended. Shortly after purchasing her PurePulse Tracker, she noticed that it was not consistently delivering accurate heart rate readings, particularly during exercise. She confirmed this by comparing the real time heart rate readings from her Charge HR with those on stationary cardiovascular exercise machines. After re-reviewing the product manuals, Plaintiff McLellan called Fitbit and was directed to reboot her Charge HR. She did so to no avail. When her Charge HR continued to deliver inaccurate heart readings, Plaintiff McLellan initiated an online chat with a Fitbit representative, who denied her a refund on her defective PurePulse Tracker. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate readings, even during exercise, Plaintiff McLellan would not have purchased her Charge HR or would have paid significantly less for it. Plaintiff McLellan is now stuck with a PurePulse Tracker that cannot perform the precise task for which she purchased it and which does not function as Fitbit expressly promised and warranted.

15. Plaintiff TERESA BLACK is Colorado citizen and resident domiciled in Grand Junction, Colorado. Plaintiff Black saw Fitbit’s advertisements touting the heart rate functionality of the PurePulse Trackers. Relying on those representations, she told her husband that she wanted a Charge HR, and her husband bought one for her from REI.com on May 25, 2015. At no point before or during the purchase of her Charge HR was Plaintiff Black provided with or required to agree to an arbitration clause or class action ban, nor was she put on notice that she would be required to agree to an arbitration clause or class action ban for her Charge HR to function as intended. Shortly after that purchase, Plaintiff Black noticed that her Charge HR was not consistently delivering accurate heart rate readings, particularly during exercise. At an intense part of a personal training session in mid-June 2015, Plaintiff Black’s personal trainer manually recorded her heart rate, which was 160 beats per minute (“bpm”). In stark contrast, her Charge HR indicated her heart rate was only 82 bpm. Plaintiff Black was approaching the maximum recommended heart rate for her age, and if she had continued to rely on her inaccurate PurePulse Tracker, she may well have exceeded it, thereby jeopardizing her health and safety. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate readings, even during exercise, Plaintiff Black would not have purchased her Charge HR or
would have paid significantly less for it. Plaintiff Black is now stuck with a PurePulse Tracker that cannot perform the precise task for which she purchased it and which does not function as Fitbit expressly promised and warranted.

16. Plaintiff DAVID URBAN is a Wisconsin citizen and resident domiciled in Hudson, Wisconsin. Plaintiff Urban is a fitness enthusiast who signed up for his first marathon in mid-2015. Given his father’s history with heart disease, Plaintiff Urban’s doctor recommended that he keep his heart rate from exceeding approximately 160 bpm. As a result, Plaintiff Urban sought an accurate heart rate monitor for his exercise and training. At the recommendation of his friends, Plaintiff Urban purchased a Surge at a Target store in Hudson, Wisconsin on October 9, 2015, for $248.82. At no point before or during the purchase of his Surge was Plaintiff Urban provided with or required to agree to an arbitration clause or class action ban, nor was he put on notice that he would be required to agree to an arbitration clause or class action ban for his Surge to function as intended. Soon after purchasing the Surge, Plaintiff Urban noticed the heart rate function did not work. Even at high intensities it never displayed a reading over 125 bpm. Plaintiff Urban then cross referenced his Surge against his chest strap-based triathlon monitor and found that the PurePulse Tracker consistently under recorded his heart rate at high intensities, often by as much as 15-25 bpm. In order to train effectively and safely, Plaintiff Urban needs to accurately record his heart rate during exercise so that he can reach, but not exceed, certain intensity levels. He cannot trust his Surge to deliver those accurate readings. Had Fitbit disclosed that the PurePulse Trackers cannot consistently deliver accurate heart rate readings, even during exercise, Plaintiff Urban would not have purchased his Surge or would have paid significantly less for it. Plaintiff Urban is now stuck with a PurePulse Tracker that cannot perform the precise task for which he purchased it and which does not function as Fitbit expressly promised and warranted.

4 Plaintiff Urban later exchanged the Surge he purchased in Hudson, Wisconsin, for a larger version of the same model at another Target store in Madison, Wisconsin.
Defendant

17. Defendant Fitbit, Inc. is a corporation doing business in all 50 states. Fitbit designs, manufactures, promotes, and sells the PurePulse Trackers described herein. Fitbit is organized and incorporated under the laws of Delaware, and its principal place of business is in San Francisco, California. It is therefore a citizen of Delaware and California. See 28 U.S.C. § 1332(c)(1).

COMMON FACTUAL ALLEGATIONS

18. Fitbit is manufacturer of activity trackers founded in 2007 and headquartered in San Francisco, California. Its products’ functions have included, among other things, step counting, distance calculating, calorie calculating, and sleep monitoring.

19. In October 2014, Fitbit announced a new feature: wrist-based heart rate monitoring. The two products equipped with this technology, dubbed PurePulse, are the Charge HR and the Surge, which typically retail at approximately $150⁵ and $250 respectively. Those products are shown below:

![PurePulse™ Heart Rate Technology Only from Fitbit](image)

I. Fitbit Falsely Claims the PurePulse Trackers Consistently Record Accurate Heart Rate.

20. Heart rate monitoring is an important feature for exercisers. Among other things, it can help users achieve and maintain proper intensity, measure effort, track progress, and stay

⁵ In contrast, the Charge model without a heart rate monitor originally retailed for $130 and now sells for approximately $100.
motivated. And for those with certain health conditions, monitoring one’s heart rate can be essential to staying safe. Traditionally, however, accurate heart rate monitoring required a chest strap, which can be uncomfortable, distracting, difficult to clean, and may not work with dry skin.

21. Fitbit attempted to circumvent these problems with its wrist-based PurePulse technology, which it expressly contrasts with “uncomfortable” chest straps.

22. Per Fitbit’s promotional materials, PurePulse uses LED lights to detect changes in capillary blood volume. It then applies “finely tuned algorithms” to “measure heart rate automatically and continuously” and allow users to “accurately track workout intensity.”

23. Unsurprisingly, the feature is the centerpiece of Fitbit’s promotional efforts. The widely-circulated advertisements include slogans like: “The Difference Between Good and Great…Is Heart”; “For Better Fitness, Start with Heart”; “Get More Benefits with Every Beat—Without An Uncomfortable Chest Strap”; “Every Beat Counts”; and “Know Your Heart.”

24. These representations feature in an extensive and widespread advertising campaign. As noted, the “Know Your Heart” commercial, for example, appeared prominently throughout Major League Baseball’s nationally-televised 2015 World Series, which averaged 14.7 million viewers per game.

25. Importantly, these advertisements and product descriptions do not state or even remotely suggest that the PurePulse technology works only at low or resting heart rates. To the contrary, Fitbit expressly markets the PurePulse Trackers for activity and fitness, and depicts them in use during high-intensity workouts.

26. The following advertisement, for example, depicts a user wearing a Charge HR and jumping rope. That, combined with the elevated heart rate shown on the featured device—135 beats per minute—and the tag line’s promise that “Every beat counts,” indicates that the product accurately records every beat, even during high intensity exercise.

27. Similarly, the following commercial screenshots purport to show the PurePulse Trackers delivering real time, elevated heart rate readings during strenuous activity:
28. In addition, the following promotional materials tout the PurePulse Trackers’ ability to monitor “real time heart rate” at intensity, and to “track[] your heart rate all day and during exercise.”
29. Fitbit’s representations are also present at many points of sale. Some Best Buy locations, for example, maintain a full comparative display with an interactive touchscreen and video feature, as shown below.

30. Some Target sites feature a similar, though lower tech, display:
In sum, Fitbit’s representations regarding the ability of the PurePulse Trackers to consistently record accurate heart rates, even during exercise, are unambiguous and widespread.

II. The PurePulse Trackers Fail to Consistently Record Accurate Heart Rate As Promised and Warranted.

32. Unfortunately, the PurePulse Trackers do not work, and their heart rate readings are wildly inaccurate.

33. Plaintiff Black, for example, observed that her Charge HR under recorded her heart rate while exercising with her personal trainer. Shortly after a high-intensity routine, they compared her Charge HR’s heart reading with a manual heart rate test, and found the PurePulse Tracker significantly under recorded her heart rate.

34. Plaintiff McLellan had the same problem. She cross referenced the heart rate readings from her Charge HR with the readings from a stationary cardiovascular machine. Again, the readings from her PurePulse Tracker were too low.
35. Plaintiff Urban had the same problem, which he verified by checking his Surge against his chest strap heart rate monitor.

36. Scores of customer complaints confirm these are not isolated incidents. The following, for example, is a non-exhaustive sampling of complaints about the PurePulse Trackers drawn from user reviews on Amazon.com:

- “The HR technology is not accurate. It's close enough below 100bpm. But 100+ and it's consistently off by 30-50%. I tested this multiple times against my chest strap and other monitors in the gym.”

- “The FitBit is regularly lower than the Polar [chest strap monitor] or cannot capture a reading at all.”

- “Workouts I know I've kept my heart rate in the 140-170 range, Fitbit says an average of 100 bpm and a max of 120. I've measure it against a chest strap as well as machines at the gym. It's just not accurate, simple as that. Huge disappointment. Not to mention it randomly stops tracking heart rate during the workout…”

- “I checked the HR accuracy of the new fitbit Charge by using it along with my Zephyr HRM which is worn on the chest and I have used for several years now. The accuracy of the fitbit swung wildly even when I switched the HR controls of the Charge from ‘auto’ to ‘on’. It could be off by as much as 20 BPM! That's fricken robbing me of my workout!”

- “I followed all the directions very closely as far as placement, etc, but there is a 30 beat/min difference between the fitbit and my Timex HR chest strap HR monitor with the discrepancy increasing as my heart rate increased.”

- “[A]s soon as my HR got above 120 [the Charge HR] either shuts down or just sits on 120. On a couple different occasions I wore my Polar at the same time. Polar had my highest heart rate at 160 BPM while the charge hr had me resting at 75.”

- “Paid extra money for HR function and it's useless….If accuracy is important to you, this isn't for you.”

- “If you are buying the HR version you are essentially just buying a more expensive Charge that has two green lights on the back and has a nicer strap because the heart rate function is useless.”

- “While working out, the heart rate jumps around for no reason. I have tried many different positions and modified the tightness. Nothing seems to help….What good is tracking your heart rate when it's mostly wrong[?]”

- “I am a 82 year old with a resting heart rate of 50 BPM just trying to stay in good basic shape using a stationary bike and rowing machine. I do 30-60 minute sessions at about 100-110 BPM…When I am working the exercise machines the reading is far short of my actual heart rate. I have tried all the suggestions here and on the Fitbit site. No luck. I am
reminded of the proverbial broken clock which is 100% accurate twice a day.”

37. Expert analysis has further corroborated the inability of the PurePulse Trackers to perform as promised and warranted. A board-certified cardiologist tested the PurePulse Trackers against an electrocardiogram (“ECG”), the gold standard of heart rate monitoring, on a number of subjects at various exercising intensities.

38. The results were as expected: the PurePulse Trackers consistently mis-recorded the heart rates by a significant degree. At intensities over 110 bpm, the Heart Rate Trackers often failed to record any heart rate at all. And even when they did record heart rates, the Heart Rate Trackers were inaccurate by an average of 24.34 bpm, with some readings off by as much as 75 bpm. With those margins of error, the Heart Rate Trackers are effectively worthless as heart rate monitoring devices.

39. Interestingly, Fitbit even admitted informally to some Class members that the monitor is inaccurate during high-intensity workouts.

40. As such, the PurePulse Trackers fail to perform the precise task for which they are expressly marketed, and Class members are deprived of the clear benefit of the bargain.

III. Fitbit Attempted to Keep Class Members Out of Court Through An Unconscionable Post-Purchase Agreement, Which Class Members Were Required to Accept in Order to Render Operational the PurePulse Trackers They Already Purchased.

41. Plaintiffs and Class members did not sacrifice their constitutional rights to a jury trial, their right to join a class action, or any substantive statutory rights when they purchased their PurePulse Trackers. No agreement to so limit their rights was requested by anyone or represented to be necessary to complete the purchase transactions, nor was there any indication at the point of sale or on the product packaging that such an agreement would be necessary to render their PurePulse Trackers operational.

42. Only after purchasing their PurePulse Trackers were Plaintiffs and Class members informed that in order to render their PurePulse Trackers functional, they must first register and create an online account through Fitbit.com and, in doing so, purportedly bind themselves to an adhesive arbitration clause and class action ban.
43. Fitbit’s Vice President for Customer Support, Jay Kershner, recently conceded under oath that because the PurePulse Trackers are “wireless-enabled wearable devices . . . [a] Fitbit user cannot use their [PurePulse Trackers] as intended until the user has set up an [online] account. In fact, the Charge HR cannot even be used as a watch until the device is first paired to a Fitbit account, which requires the user to agree to the Terms of Service.” (Brickman v. Fitbit, Inc., No. 3:15-cv-2077, Doc. 41 at ¶4 (N.D. Cal. Sept. 30, 2015)).

44. Agreeing to those Terms of Service, in turn, comes at a high and hidden cost. The Terms of Service contain a section entitled “Dispute Resolution” which, among other things, purports to:

   a. eliminate the consumer’s constitutional rights to a jury trial by designating binding arbitration as the only forum for dispute resolution (with a one-sided exception allowing Fitbit to utilize the courts to prosecute intellectual property claims);

   b. prohibit class actions; and

   c. impose an extra-judicial, one-year statute of limitations on every one of the Class members’ potential causes of action relating to use of the PurePulse Trackers.

45. Notably, the Terms of Service purport to govern not just the services offered through the online account, but also any conceivable grievance that might arise from use of the PurePulse Trackers themselves, regardless of whether that use implicates the wireless service.

46. Even more remarkably, Fitbit claims that the Terms of Service bind anyone who so much as visits Fitbit’s website, even if they do not register for an account.

47. This unilateral and unconscionable attempt to curtail Class members’ constitutional and statutory rights is buried near the end of a long document and, unlike the preceding section, is not highlighted or emphasized in any way.

48. Moreover, while the Dispute Resolution section contains an inconspicuous provision outlining a limited procedure for opting out of the arbitration agreement, no such opt-

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7 As defined below, the proposed Class definition excludes those who purchased their PurePulse Trackers directly from Fitbit.com. Upon information and belief, those consumers were the only ones even informed of Fitbit’s Terms of Service prior to finalizing their PurePulse Tracker purchases.
out possibility exists for the class action waiver, the one-year statute of limitation, or the clauses
governing selection of law and forum.

49. To reiterate, there is no mention on the product packaging or anywhere else at the
point of sale that the PurePulse Trackers will work as intended only after setting up an online
account or, critically, that such an account will be governed by Terms of Service including the
unconscionable provisions detailed above.

50. Those post-purchase clauses are therefore invalid and unenforceable as a matter
of law to Plaintiffs and Class members.

CLASS ACTION ALLEGATIONS

51. Plaintiffs bring this lawsuit as a class action on their own behalf and on behalf of
all other persons similarly situated as members of the proposed Class, pursuant to Federal Rules
of Civil Procedure 23(a) and (b)(3), and/or (b)(1), (b)(2), and/or (c)(4). This action satisfies the
numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of
those provisions.

52. The proposed Classes are defined as:

Nationwide Class

All persons or entities in the United States who purchased a Fitbit
PurePulse Tracker, as defined herein, excluding those who
purchased their PurePulse Trackers directly from Fitbit on
Fitbit.com and who did not opt out of the arbitration agreement.

California Subclass

All persons or entities in the California who purchased a Fitbit
Heart Rate Fitness Watch, as defined herein, excluding those who
purchased their PurePulse Trackers directly from Fitbit on
Fitbit.com and who did not opt out of the arbitration agreement.

Colorado Subclass

All persons or entities in the Colorado who purchased a Fitbit
Heart Rate Fitness Watch, as defined herein, excluding those who
purchased their PurePulse Trackers directly from Fitbit on
Fitbit.com and who did not opt out of the arbitration agreement.

Wisconsin Subclass

All persons or entities in the Wisconsin who purchased a Fitbit
Heart Rate Fitness Watch, as defined herein, excluding those who
purchased their PurePulse Trackers directly from Fitbit on Fitbit.com and who did not opt out of the arbitration agreement.

53. Excluded from the Nationwide Class and Subclasses (the “Classes”) are:

(A) Fitbit, any entity or division in which Fitbit has a controlling interest, and their legal representatives, officers, directors, assigns, and successors; (B) the Judge to whom this case is assigned and the Judge’s staff; (C) governmental entities; and (D) those persons who have suffered personal injuries or emotional distress as a result of the facts alleged herein. Plaintiffs reserve the right to amend the Class definitions if discovery and further investigation reveal that any Class should be expanded, divided into additional subclasses, or modified in any other way.

Numerosity and Ascertainability

54. Although the exact number of Class members is uncertain, the size of the Classes can be estimated with reasonable precision, and the number is great enough that joinder is impracticable.

55. Fitbit sold 3,866,000 units in the first quarter of 2015.8 Analysts suggest that most of these sales were generated by the Charge HR,9 and Fitbit attributes 78% of its first quarter revenue to the Charge HR and Surge together. The number of Class members is therefore likely in the millions, and the disposition the Class members’ claims in a single action will provide substantial benefits to all parties and to the Court. Class members are readily identifiable from information and records in possession, custody, or control of Fitbit, the Class members, and the PurePulse Tracker retailers.

Typicality

56. The claims of the representative Plaintiffs are typical of the claims of the Classes in that the representative Plaintiffs, like all Class members, purchased a PurePulse Tracker designed, manufactured, and distributed by Fitbit. The representative Plaintiffs, like all Class members, were damaged by Fitbit’s misconduct in that they have suffered actual damages as a result of their purchase of the PurePulse Trackers. Furthermore, the factual bases of Fitbit’s

misconduct are common to all Plaintiffs and represent a common thread of misconduct resulting in injury to all Class members.

**Adequate Representation**

57. Plaintiffs are members of the Classes and will fairly and adequately represent and protect the interests of the Classes. Plaintiffs have retained counsel with substantial experience in prosecuting consumer class actions, including actions involving defective products.

58. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Classes and have the financial resources to do so. Neither Plaintiffs nor their counsel have interests adverse to those of the Classes.

**Predominance of Common Issues**

59. There are numerous issues of law and fact common to Plaintiffs and Class members that predominate over any issue affecting only individual Class members. Resolving these common issues will advance resolution of the litigation as to all Class members. These common legal and factual issues include:

a. whether the PurePulse Trackers fail to consistently deliver accurate heart rate monitoring, as advertised and warranted;

b. whether Fitbit knew or should have known that the PurePulse Trackers do not consistently deliver accurate heart rate monitoring;

c. whether the inability of the PurePulse Trackers to consistently record accurate heart rates constitutes a material fact that reasonable consumers would have considered important in deciding whether to purchase a PurePulse Tracker or pay an increased price for them;

d. whether Fitbit’s concealment of the Heart Rate Defect in the PurePulse Trackers induced reasonable consumers to act to their detriment by purchasing a PurePulse Tracker;

e. whether Fitbit made material misrepresentations regarding PurePulse Trackers;
f. whether Fitbit had a duty to disclose the true nature of the PurePulse Trackers to Plaintiffs and Class members;
g. whether Fitbit omitted and failed to disclose material facts about the PurePulse Trackers;
h. whether Plaintiffs and Class members are entitled to a declaratory judgment;
i. whether Plaintiffs and Class members are entitled to equitable relief, including, but not limited to, a preliminary and/or permanent injunction, and /or rescission;
j. whether Plaintiffs and Class members are entitled to restitution and/or disgorgement and the amount of such;
k. whether Plaintiffs and Class members are entitled to actual damages and the amount of such; and
l. whether Plaintiffs and Class members are entitled to punitive or exemplary damages and the amount of such.

Superiority

60. Plaintiffs and Class members all suffered—and will continue to suffer—harm and damages as a result of Fitbit’s uniformly unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

61. Absent a class action, most Class members would likely find the cost of litigating their claims prohibitively high and would have no effective remedy at law. Because of the relatively small size of the individual Class members’ claims, it is likely that few, if any, Class members could afford to seek legal redress for Fitbit’s misconduct. Absent a class action, Class members’ damages will go uncompensated, and Fitbit’s misconduct will continue without remedy.

62. Class treatment of common questions of law and fact would also be a superior method to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the courts and the litigants, and will promote consistency and efficiency of adjudication.
63. Fitbit has acted in a uniform manner with respect to the Plaintiffs and Class members.

64. Classwide declaratory, equitable, and injunctive relief is appropriate under Rule 23(b)(1) and/or (b)(2) because Fitbit has acted on grounds that apply generally to the class, and inconsistent adjudications with respect to the Fitbit’s liability would establish incompatible standards and substantially impair or impede the ability of Class members to protect their interests. Classwide relief assures fair, consistent, and equitable treatment and protection of all Class members, and uniformity and consistency in Fitbit’s discharge of their duties to perform corrective action regarding the PurePulse Trackers.

**CHOICE OF LAW ALLEGATIONS**

65. Because this Complaint is brought in California, California’s choice of law regime governs the state law allegations in this Complaint.

66. Under California’s governmental interest/comparative impairment choice of law rules, California law applies to the claims of all Class members, regardless of their state of residence or state of purchase.

67. Because Fitbit is headquartered—and made all decisions relevant to these claims—in California, California has a substantial connection to, and materially greater interest in, this the rights, interests, and policies involved in this action than any other state.

68. Nor would application of California law to Fitbit and the claims of all Class members be arbitrary or unfair. Indeed, in its Terms of Service, Fitbit declares that, regardless of any state’s conflict of law principles, “the resolution of any Disputes shall be governed by and construed in accordance with the laws of the State of California.” Although the Terms of Service are void and unenforceable as to Plaintiffs and Class members in other respects, this provision demonstrates Fitbit’s awareness and agreement that California law should apply to the claims in this Complaint, and Fitbit is estopped from contending otherwise.
CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of California’s Consumers Legal Remedies Act (“CLRA”),

69. Plaintiffs hereby incorporate by reference the allegations contained in the
preceding paragraphs of this Complaint.

70. This claim is brought on behalf of the Nationwide Class and California Subclass
to seek injunctive relief as well as monetary damages against Fitbit under California’s

71. Fitbit is a “person” as defined by the CLRA. Cal. Civ. Code § 1761(c).

72. Plaintiffs and Class members are “consumers” within the meaning of the CLRA,
as defined by Cal. Civ. Code § 1761(d), who purchased one or more PurePulse Trackers.

73. The CLRA prohibits “unfair or deceptive acts or practices undertaken by any
person in a transaction intended to result or which results in the sale or lease of goods or services

74. Fitbit engaged in unfair or deceptive trade practices that violated Cal. Civ. Code §
1770(a), as described above and below, by, among other things, failing to disclose the defective
nature of the PurePulse Trackers, representing that the PurePulse Trackers had characteristics
and benefits that they do not have (e.g., the ability to consistently record accurate heart rates,
even during high-intensity exercise), representing that the PurePulse Trackers were of a
particular standard, quality, or grade when they were of another, and advertising PurePulse
Trackers with the intent not to sell them as advertised. See Cal. Civ. Code §§ 1770(a)(5), (a)(7),
(a)(9).

75. Fitbit knew, should have known, or was reckless in not knowing that its products
did not have the qualities, characteristics, and functions it represented, warranted, and advertised
them to have.

76. Fitbit’s unfair and deceptive acts or practices occurred repeatedly in Fitbit’s
course of trade or business, were material, were capable of deceiving a substantial portion of the
purchasing public, and imposed a safety risk to Plaintiffs and Class members.
77. Fitbit was under a duty to Plaintiffs and Class members to disclose the deceptive and defective nature of the PurePulse Trackers because:
   a. The defect in the PurePulse Trackers presents a safety hazard because Class members’ could jeopardize their health by relying on the inaccurate heart rate readings and potentially achieving dangerous heart rates;
   b. Fitbit was in a superior position to know the true state of facts about the Heart Rate Defect in the PurePulse Trackers;
   c. Plaintiffs and Class members could not reasonably have been expected to learn or discover that the PurePulse Trackers contained the Heart Rate Defect; and
   d. Fitbit knew that Plaintiffs and Class members could not reasonably have been expected to learn or discover the defect in the PurePulse Trackers.

78. In failing to disclose the defective nature of the PurePulse Trackers, Fitbit knowingly and intentionally concealed material facts and breached its duty not to do so.

79. The facts that were misrepresented, concealed or not disclosed by Fitbit to Plaintiffs and Class members are material in that a reasonable consumer would have considered them to be important in deciding whether or not to purchase a PurePulse Tracker. Had Plaintiffs and other Class members known about the true nature and quality of the PurePulse Trackers, they would not have purchased a PurePulse Tracker or would have paid significantly less than they did for their PurePulse Trackers.

80. Plaintiffs and Class members are reasonable consumers who expect that their PurePulse Trackers will consistently record accurate heart rates, as represented.

81. As a result of Fitbit’s conduct and unfair or deceptive acts or practices, Plaintiffs and Class members suffered actual damages in that the PurePulse Trackers do not function as represented and are not worth the amount paid and Fitbit has deprived Plaintiffs and Class members the benefit of the bargain.

82. Plaintiffs and the Class seek an order enjoining Defendant’s unfair or deceptive acts or practices, equitable relief, an award of attorneys’ fees and costs under Cal. Civ. Code § 1780(e), and any other just and proper relief available under the CLRA.
83. In addition, many Class members are senior citizens or disabled persons, as defined by Cal. Civ. Code §§ 1761(f) and (g), who suffered substantial economic damage resulting from the Fitbit’s fraudulent representations regarding the PurePulse Trackers. Each of those Class members is entitled to up to an additional $5,000. Cal. Civ. Code § 1780(b).

84. In accordance with section 1782(a) of the CLRA, on November 16, 2015, Plaintiffs’ counsel served Fitbit with notice of its alleged violations of Cal. Civ. Code § 1770(a) relating to the Heart Rate Defect in the PurePulse Trackers purchased by Plaintiffs and Class members. Plaintiffs’ letter is attached to this Complaint as Exhibit A, for reference. Fitbit did not correct or agree to correct the actions described in the letter and in this Complaint within thirty (30) days of the notice. Fitbit’s response is attached as Exhibit B. Plaintiffs and Class members thus seek an award of compensatory, monetary, and punitive damages based on the conduct described herein, as well as any other relief the Court deems proper.

SECOND CLAIM FOR RELIEF
Violation of California’s Unfair Competition Law,
Cal. Bus. & Prof. Code § 17200, et seq. – Based On the Heart Rate Defect

85. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

86. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and California Subclass.

87. California Business & Professions Code § 17200 prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice” and “unfair, deceptive, untrue or misleading advertising.” Fitbit’s conduct related to the Heart Rate Defect violated each of this statute’s three prongs.


89. Fitbit committed unfair business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, et seq., when it represented that the PurePulse Trackers could consistently
record accurate heart rate, even during exercise, when in fact they cannot. The Heart Rate
Defect also presents a safety hazard as it can jeopardize the health and safety of users who rely
on the inaccurate heart rate readings and unknowingly achieve dangerous heart rates.

90. Fitbit committed fraudulent business acts and practices in violation of Cal. Bus. &
Prof. Code § 17200, et seq., when it affirmatively and knowingly misrepresented that the
PurePulse Trackers consistently record accurate heart rates, even during high-intensity exercise,
when in fact they do not. Fitbit’s representations and concealment of the Heart Rate Defect are
likely to mislead the public with regard to the true defective nature of the PurePulse Trackers.

91. Fitbit also disseminated unfair, deceptive, untrue and/or misleading advertising in
violation of Cal. Bus. & Prof. Code § 17200, et seq. and § 17500, et seq. when it distributed
advertisements falsely representing that the PurePulse Trackers consistently record accurate
heart rates, even at high intensity, when in fact they do not.

92. Fitbit’s unfair or deceptive acts or practices occurred repeatedly in the course of
Fitbit’s trade or business, and were capable of deceiving a substantial portion of the purchasing
public.

93. As a direct and proximate result of Fitbit’s unfair and deceptive practices,
Plaintiffs and Class members suffered and will continue to suffer actual damages.

94. As a result of its unfair and deceptive conduct, Fitbit has been unjustly enriched
and should be required to disgorge its unjust profits and make restitution to Plaintiffs and Class
members pursuant to Cal. Bus. & Prof. Code §§ 17203 and 17204.

95. Plaintiffs and the Class further seek an order enjoining Fitbit’s unfair or deceptive
acts or practices, and an award of attorneys’ fees and costs under Cal. Code of Civ. Proc. §
1021.5.

THIRD CLAIM FOR RELIEF
Violation of California’s Unfair Competition Law,
Cal. Bus. & Prof. Code § 17200, et seq. – Based On the Post-Purchase “Terms of Service”

96. Plaintiffs hereby incorporate by reference the allegations contained in the
preceeding paragraphs of this Complaint.
97. Plaintiffs bring this cause of action for themselves and on behalf of the
Nationwide Class and California Subclass.

98. California Business & Professions Code § 17200 prohibits acts of “unfair
competition,” including any “unlawful, unfair or fraudulent business act or practice” and “unfair,
deceptive, untrue or misleading advertising.”

99. Fitbit’s conduct related to the post-purchase Terms of Service—unilaterally
imposing Terms of Service in a post-purchase agreement that included an arbitration clause with
a one-sided exception, forum selection clause, choice of law provision, class action ban, and
claim period limitation—constitutes an additional violation of the statute’s unfair and fraudulent
prongs.

100. Specifically, Fitbit committed unfair and fraudulent business acts and practices in
violation of Cal. Bus. & Prof. Code § 17200, et seq., by concealing and failing to alert Plaintiffs
and Class members at the point of sale either expressly, or by reference to the Terms of Service,
that in order to make full use of the PurePulse Trackers—and, indeed, even to render them
operable—they would be required to register for an online account, and that the account would
be accompanied by click wrap terms of service which purport to significantly curtail the Class
members’ legal rights.

101. Fitbit further advanced this unfair and fraudulent business act and practice by
attempting to compel arbitration and preclude class action litigation based on the unconscionable
post-purchase agreement. Indeed, in this case, Fitbit instructed Plaintiffs’ counsel that “Ms.
McLellan cannot litigate her claim and cannot represent a class,” despite the fact that she never
was presented with or agreed to any such “agreement” prior to purchasing her PurePulse
Tracker.

102. Fitbit’s unfair or deceptive acts or practices occurred repeatedly in the course of
Fitbit’s trade or business, and were capable of deceiving a substantial portion of the purchasing
public.

103. As a direct and proximate result of Fitbit’s unfair and deceptive practices,
Plaintiffs and Class members suffered and will continue to suffer actual damages.
104. As a result of its unfair and deceptive conduct, Fitbit has been unjustly enriched and should be required to disgorge its unjust profits and make restitution to Plaintiffs and Class members pursuant to Cal. Bus. & Prof. Code §§ 17203 and 17204.

105. Plaintiffs and the Class further seek an order enjoining Fitbit’s unfair or deceptive acts or practices, and an award of attorneys’ fees and costs under Cal. Code of Civ. Proc. § 1021.5.

FOURTH CLAIM FOR RELIEF
Common Law Fraud

106. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

107. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and all the Subclasses.

108. Fitbit engaged in both speaking and silent fraud, and in fraudulent and deceptive conduct. As described above, Fitbit’s conduct defrauded Plaintiffs and Class members, by intentionally leading them to believe, through affirmative misrepresentations, omissions, suppressions, and concealments of material fact, that the PurePulse Trackers possessed important characteristics that they in fact do not possess—namely that they could consistently record accurate heart rate, even during high-intensity exercise—and inducing their purchases.

109. Fitbit’s intentional and material misrepresentations included, among other things, its advertising, marketing materials and messages, and other standardized statements claiming the PurePulse Trackers consistently record accurate heart rates.

110. The foregoing misrepresentations were uniform across all Class members. The same extensive and widespread advertising campaign was promoted nationwide, and all of the promotional materials contained the same material representations regarding the PurePulse Trackers’ ability consistently record accurate heart rates.

111. These representations were false, as detailed herein. Fitbit knew the representations were false when it made them and intended to defraud purchasers thereby.
112. Fitbit also had a duty to disclose, rather than conceal and suppress, the full scope and extent of the Heart Rate Defect because:
   a. Fitbit had exclusive knowledge of the Heart Rate Defect in the PurePulse Trackers and concealment thereof;
   b. The details regarding the Heart Rate Defect in the PurePulse Trackers and concealment thereof were known and/or accessible only to Fitbit;
   c. Fitbit knew Plaintiffs and Class members did not know about the Heart Rate Defect in the PurePulse Trackers and concealment thereof; and
   d. Fitbit made general representations about the qualities of the PurePulse Trackers, including statements about their performance and abilities that were misleading, deceptive, and incomplete without the disclosure of the fact that the PurePulse Trackers could not consistently record accurate heart rates, particularly during exercise.

113. Fitbit’s actions constitute “actual fraud” within the meaning of Cal. Civ. Code § 1572 because Fitbit did the following with the intent to deceive Plaintiffs and Class members and to induce them to enter into their contracts:
   a. Suggested that the PurePulse Trackers can consistently record accurate heart rates, even at high intensities, even though it knew this to be not true;
   b. Positively asserted that the PurePulse Trackers can consistently record accurate heart rates, even at high intensities, in a manner not warranted by the information available to Fitbit;
   c. Suppressed the true nature of the Heart Rate Defect from Plaintiffs and Class members; and
   d. Promised it would deliver PurePulse Trackers that consistently record accurate heart rates, even at high intensities, with no intention of so doing.

114. Fitbit’s actions, listed above, also constituted “deceit” as defined by Cal. Civ. Code § 1710 because Fitbit willfully deceived Plaintiffs and Class members with intent to induce them to alter their positions to their detriment by purchasing defective PurePulse Trackers.
115. Fitbit’s fraud and concealment was also uniform across all Class members; Fitbit concealed from everyone the true nature of the Heart Rate Defect in the PurePulse Trackers.

116. Fitbit’s misrepresentations and omissions were material in that they would affect a reasonable consumer’s decision to purchase a PurePulse Tracker. Consumers paid a premium for the PurePulse Trackers precisely because they purportedly offered continuous, accurate heart rate readings.

117. Fitbit’s intentionally deceptive conduct induced Plaintiffs and Class members to purchase the PurePulse Trackers and resulted in harm and damage to them.

118. Plaintiffs believed and relied upon Fitbit’s misrepresentations and concealment of the true facts. Class members are presumed to have believed and relied upon Fitbit’s misrepresentations and concealment of the true facts because those facts are material to a reasonable consumer’s decision to purchase the PurePulse Trackers.

119. As a result of Fitbit’s inducements, Plaintiffs and Class members sustained actual damages including but not limited to receiving a product that performs as promised and not receiving the benefit of the bargain of their PurePulse Tracker purchases. If Plaintiffs and Class members had known about the Heart Rate Defect, they would not have purchased the PurePulse Trackers or would have paid significantly less for them. Fitbit is therefore liable to Plaintiffs and Class members in an amount to be proven at trial.

120. Fitbit’s conduct was systematic, repetitious, knowing, intentional, and malicious, and demonstrated a lack of care and reckless disregard for Plaintiffs’ and Class members’ rights and interests. Fitbit’s conduct thus warrants an assessment of punitive damages under Cal. Civ. Code § 3294 and other applicable states’ laws, consistent with the actual harm it has caused, the reprehensibility of its conduct, and the need to punish and deter such conduct.

**FIFTH CLAIM FOR RELIEF**

**Fraud in the Inducement**

121. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.
122. Plaintiffs bring this cause of action for themselves and on behalf of the
Nationwide Class and all the Subclasses.

123. Fitbit’s fraud and false affirmations of fact, described herein, induced Plaintiffs
and Class members to purchase the PurePulse Trackers and thereby enter into a contract with
Fitbit.

124. As described above, Fitbit had a duty to disclose the Heart Rate Defect in the
PurePulse Trackers to Plaintiffs and Class members.

125. As described above, Fitbit’s actions constituted actual fraud and deceit as defined

126. Plaintiffs justifiably relied to their detriment on the truth and completeness of
Fitbit’s material representations regarding the PurePulse Trackers. Class members are presumed
to have relied upon Fitbit’s misrepresentations and concealment of the true facts because those
facts are material to a reasonable consumer’s decision to purchase the PurePulse Trackers.

127. Fitbit’s fraud and concealment was also uniform across all Class members; Fitbit
concealed from everyone the true nature of the Heart Rate Defect in the PurePulse Trackers.

128. Plaintiffs and Class members would not have agreed to purchase their PurePulse
Trackers, or would have paid less for them, if they had not been deceived by Fitbit.

129. As a result of Fitbit’s inducements, Plaintiffs and Class members sustained actual
damages including but not limited to not receiving a product that performs as promised and not
receiving the benefit of the bargain of their PurePulse Tracker purchases.

130. Fitbit’s conduct was systematic, repetitious, knowing, intentional, and malicious,
and demonstrated a lack of care and reckless disregard for Plaintiffs’ and Class members’ rights
and interests. Fitbit’s conduct thus warrants an assessment of punitive damages under Cal. Civ.
Code § 3294 and other applicable states’ laws, consistent with the actual harm it has caused, the
reprehensibility of its conduct, and the need to punish and deter such conduct.
SIXTH CLAIM FOR RELIEF
Unjust Enrichment

131. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

132. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and all the Subclasses.

133. Fitbit has been unjustly enriched in that it sold the PurePulse Trackers with defective heart rate monitors that do not consistently record accurate heart rates as represented.

134. When purchasing their PurePulse Trackers, Plaintiffs and Class members reasonably believed that the PurePulse Trackers would perform as advertised and as warranted and would consistently record accurate heart rates, even during high-intensity exercise.

135. Plaintiffs and Class members received less than what they paid for in that the PurePulse Trackers do not consistently record accurate heart rates as represented and therefore do not deliver as promised.

136. Plaintiffs and Class members conferred a benefit on Fitbit by purchasing, and paying a premium for, the PurePulse Trackers. Had Plaintiffs and Class members known about the Heart Rate Defect, they would not have purchased the PurePulse Trackers or would have paid significantly less for them.

137. Fitbit should therefore be required to disgorge all profits, benefits, and other such compensation it obtained through its wrongful conduct.

SEVENTH CLAIM FOR RELIEF
Revocation of Acceptance
Cal. Com. Code § 2608

138. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

139. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and the California Subclass.

140. Plaintiffs and Class members revoke their acceptance of the PurePulse Trackers.
141. Plaintiffs and Class members had no knowledge of the Heart Rate Defect when they purchased their PurePulse Trackers, and their acceptance of the goods was reasonably induced by the difficulty of discovering the Heart Rate Defect and Fitbit’s false representations that the PurePulse Trackers could consistently record accurate heart rates, and therefore were not defective.

142. The Heart Rate Defect substantially impairs the value of the PurePulse Trackers to Plaintiffs and Class members.

143. There has been no substantial change in the condition of the PurePulse Trackers not caused by the Heart Rate Defect.

144. As described herein, Plaintiffs notified Fitbit of the Heart Rate Defect.

145. Consequently, Plaintiffs and Class members are entitled to revoke their acceptances, receive all payments made to Fitbit, and to all incidental and consequential damages, and all other damages allowable under law, all in amounts to be proven at trial.

EIGHTH CLAIM FOR RELIEF
Breach of Express Warranty

146. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

147. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and all the Subclasses.

148. By advertising the heart rate function of the PurePulse Trackers, Fitbit expressly warranted to Plaintiffs and Class members that the PurePulse Trackers would record heart rate accurately, even during exercise.

149. By way of non-exhaustive example, Fitbit represented that
   a. the PurePulse Trackers provide “continuous, automatic . . . heat rate” monitoring which allows users to “maintain intensity”;
   b. “Surge tracks your heart rate all day and during exercise” (emphasis added); and
c. Charge HR “is an advanced heart rate and activity-tracking wristband, built for all-day activity, *workouts* and beyond.” (emphasis added).

150. Such statements became the basis of the bargain for Plaintiffs and other Class members because such statements are among the facts a reasonable consumer would consider material in the purchase of a heart rate monitoring fitness product.

151. Fitbit breached this express warranty by delivering PurePulse Trackers that do not deliver as promised and fail to consistently record accurate heart rates, especially during exercise.

152. As a result of the foregoing breaches of express warranty, Plaintiffs and other Class members have been damaged in that they purchased PurePulse Trackers that could not perform as warranted and did not receive the benefit of the bargain of their PurePulse Tracker purchases.

153. Plaintiffs and Class members seek all damages permitted by law in an amount to be proven at trial.

**NINTH CLAIM FOR RELIEF**


154. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

155. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and all the Subclasses.

156. The PurePulse Trackers are “consumer products” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

157. Plaintiffs and Class members are “consumers” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3), because they are persons entitled under applicable state law to enforce against the warrantor the obligations of its express and implied warranties.

158. Fitbit is a “supplier” and “warrantor” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4)-(5).
159. Section 2310(d)(1) of Chapter 15 of the United States Code provides a cause of action for any consumer who is damaged by the failure of a warrantor to comply with a written or implied warranty.

160. Fitbit provided Plaintiffs and the other Class members with an implied warranty of merchantability in connection with the purchase or lease of the PurePulse Trackers is an “implied warranty” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7). As a part of the implied warranty of merchantability, Fitbit warranted that the PurePulse Trackers would pass without objection in the trade as designed, manufactured, and marketed, and were adequately labeled.

161. Fitbit breached these implied warranties, as described in more detail above, and are therefore liable to Plaintiffs and the Class pursuant to 15 U.S.C. § 2310(d)(1).

162. Any efforts to limit the implied warranties in a manner that would exclude coverage of the PurePulse Trackers is unconscionable, and any such effort to disclaim, or otherwise limit, liability for the PurePulse Trackers is null and void.

163. Plaintiffs and the other Class members have had sufficient direct dealings with either Fitbit or its agents to establish privity of contract.

164. Nonetheless, privity is not required here because Plaintiffs and other Class members are intended third-party beneficiaries of contracts between Fitbit and its retailers, and specifically, of the implied warranties. The retailers were not intended to be the ultimate consumers of the PurePulse Trackers and have no rights under the warranty agreements provided with the PurePulse Trackers; the warranty agreements were designed for and intended to benefit consumers.

165. Pursuant to 15 U.S.C. § 2310(e), Plaintiffs are entitled to bring this class action and are not required to give Fitbit notice and an opportunity to cure until such time as the Court determines the representative capacity of Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure.

166. Furthermore, to the extent such notice is required, it has been provided through the letter sent to Fitbit by Plaintiffs’ counsel on November 16, 2015 (Ex. A), described herein, as
well as through complaints lodged by Plaintiff McLellan and other Class members. Fitbit refused to remedy its wrongs after receiving these notifications and any further notice would be futile.

167. Plaintiffs’ individual claims place into controversy an amount equal to or exceeding $25.00. The amount in controversy of this entire action exceeds the sum of $50,000.00, exclusive of interest and costs, computed on the basis of all claims to be determined in this lawsuit. Plaintiffs, individually and on behalf of the other Class members, seek all damages permitted by law, including diminution in value of their vehicles, in an amount to be proven at trial.

168. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiffs and the other Class members are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys’ fees based on actual time expended) determined by the Court to have reasonably been incurred by Plaintiffs and the other Class members in connection with the commencement and prosecution of this action.

169. Further, Plaintiffs and the Class are also entitled to equitable relief under 15 U.S.C. § 2310(d)(1).

TENTH CLAIM FOR RELIEF

Violation of the Song-Beverly Consumer Warranty Act for Breach of the Implied Warranty of Merchantability
Cal. Civ. Code §§ 1791.1 & 1792

170. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

171. Plaintiffs bring this cause of action for themselves and on behalf of the Nationwide Class and the California Subclass.

172. Plaintiffs and members of the Class are “buyers” within the meaning of Cal. Civ. Code § 1791(b).

174. Fitbit is a “manufacturer” of the PurePulse Trackers within the meaning Cal. Civ. Code § 1791(j).

175. Fitbit impliedly warranted to Plaintiffs and Class members that its PurePulse Trackers were “merchantable” within the meaning of Cal. Civ. Code §§ 1791.1(a) and 1792; however, the PurePulse Trackers do not have the quality that a buyer would reasonably expect, and were therefore not merchantable.

176. Cal. Civ. Code § 1791.1(a) states:

“Implied warranty of merchantability” or “implied warranty that goods are merchantable” means that the consumer goods meet each of the following:

(1) Pass without objection in the trade under the contract description.

(2) Are fit for the ordinary purposes for which such goods are used.

(3) Are adequately contained, packaged, and labeled.

(4) Conform to the promises or affirmations of fact made on the container or label.

177. The PurePulse Trackers would not pass without objection in the trade because they do not perform as warranted because they do not provide consistent, accurate heart rate readings, even during exercise.

178. Similarly, the PurePulse Trackers’ inability to consistently record accurate heart rates renders them unfit for the ordinary purpose of a heart rate monitor.

179. The PurePulse Trackers are not adequately labeled because the labeling represents that they consistently record accurate heart rates, which they do not do.

180. For the same reason, the PurePulse Trackers do not conform to the promises or affirmations of fact made on the container or label.

181. Fitbit thus breached the implied warranty of merchantability.

182. As a direct and proximate result of Fitbit’s breach of the implied warranty of merchantability, Plaintiffs and the other Class members did not receive the benefit of their bargain and received goods with a defect that substantially impairs their value to Plaintiffs and
Class members. Plaintiffs and Class members were damaged as a result of the defect in the PurePulse Trackers, the products’ malfunctioning, and the nonuse of their PurePulse Trackers.

183. Notice of breach is not required because Plaintiffs and the other Class members did not purchase their PurePulse Trackers directly from Fitbit.

184. Nevertheless, Plaintiffs notified Fitbit of its breach via a November 16, 2015, letter to its general counsel.

185. Pursuant to Cal. Civ. Code §§ 1791.1(d) & 1794, Plaintiffs and Class members are entitled to damages and other legal and equitable relief including, at their election, the purchase price of their PurePulse Trackers or the overpayment or diminution in value of their PurePulse Trackers.

186. Pursuant to Cal. Civ. Code § 1794, Plaintiffs and the other Class members are entitled to costs and attorneys’ fees.

ELEVENTH CLAIM FOR RELIEF
Violation of the Colorado Consumer Protection Act

187. Plaintiff Black hereby incorporates by reference the allegations contained in the preceding paragraphs of this Complaint.

188. As described above, California law applies to the claims of all Plaintiffs and Class members. In the alternative, Plaintiff Black brings this cause of action for herself and on behalf of the Colorado Subclass.

189. Colorado’s Consumer Protection Act (the “CCPA”) prohibits a person from engaging in a “deceptive trade practice,” which includes knowingly making “a false representation as to the source, sponsorship, approval, or certification of goods,” or “a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods.” Colo. Rev. Stat. § 6-1-105(1)(b),(e). The CCPA further prohibits “represent[ing] that goods … are of a particular standard, quality, or grade … if he knows or should know that they are of another,” and “advertis[ing] goods … with intent not to sell them as advertised.” Colo. Rev. Stat. § 6-1-105(1)(g), (i).
190. Fitbit is a “person” as defined by § 6-1-102(6) of the CCPA. Col. Rev. Stat. § 6-1-101, et seq.

191. Plaintiff Black and Colorado Subclass members are “consumers” under the CCPA.

192. In the course of business, Fitbit wilfully misrepresented and failed to disclose the Heart Rate Defect in the PurePulse Trackers. Fitbit therefore engaged in unlawful trade practices proscribed by the CCPA, including representing that the PurePulse Trackers have characteristics, uses, benefits, and qualities which they do not have; representing that PurePulse Trackers are of a particular standard and quality when they are not; advertising the PurePulse Trackers with the intent not to sell them as advertised; and otherwise engaging in conduct likely to deceive.

193. Plaintiff Black and Colorado Subclass members were deceived by Fitbit’s failure to disclose the Heart Rate Defect in the PurePulse Trackers.

194. Plaintiff Black and Colorado Subclass members reasonably relied upon Fitbit’s false and misleading misrepresentations and had no way of knowing that the representations were false and misleading before purchasing their PurePulse Trackers.

195. Fitbit intentionally and knowing misrepresented material facts regarding the Heart Rate Defect in the PurePulse Trackers with an intent to mislead Plaintiff Black and Colorado Subclass members.

196. Fitbit knew, should have known, or was reckless in not knowing that its products did not have the qualities, characteristics, and functions it represented, warranted, and advertised them to have.

197. Fitbit’s actions as set forth above occurred in the conduct of trade or commerce.

198. Fitbit’s conduct proximately caused injuries to Plaintiff Black and Colorado Subclass members

199. Plaintiff Black and Colorado Subclass members were injured as a direct and natural consequence result of Fitbit’s conduct in that they purchased PurePulse Trackers they
would have not otherwise purchased, or would have paid significantly less for, and did not
receive the benefit of their bargain.

seek monetary relief against Fitbit measured as the greater of (a) actual damages in an amount to
be determined at trial and the discretionary trebling of such damages, or (b) statutory damages in
the amount of $500 for each Colorado Subclass member.

201. Plaintiff Black and Colorado Subclass members also seek an order enjoining
Fitbit’s unfair, unlawful, and/or deceptive practices, declaratory relief, attorneys’ fees, and any
other just and proper relief available under the CCPA.

**TWELFTH CLAIM FOR RELIEF**

Violation of the Wisconsin Deceptive Trade Practices Act
Wis. Stat. § 110.18

202. Plaintiff Urban hereby incorporates by reference the allegations contained in the
preceding paragraphs of this Complaint.

203. As described above, California law applies to the claims of all Plaintiffs and Class
members. In the alternative, Plaintiff Urban brings this cause of action for himself and on behalf
of the Wisconsin Subclass.

204. The Wisconsin Deceptive Trade Practices Act (“Wisconsin DTPA”) prohibits a
“representation or statement of fact which is untrue, deceptive or misleading.” Wis. Stat.
§ 100.18(1).

205. Fitbit is a “person, firm, corporation or association” within the meaning of the
Wisconsin DTPA. Wis. Stat. § 100.18(1).

206. Plaintiff Urban and the Wisconsin Subclass members, or their spouses, purchased
PurePulse Trackers and are members of “the public” within the meaning of the Wisconsin
DTPA. Wis. Stat. § 100.18(1).

207. In the course of its business, Fitbit engaged in unfair and deceptive acts and
practices that violated the Wisconsin DTPA, including misrepresenting the nature of the
PurePulse Trackers and concealing and suppressing information about the Heart Rate Defect in
the PurePulse Trackers with intent that others rely upon such concealment, suppression, or omission, in connection with their PurePulse Tracker purchases.

208. Fitbit intentionally and knowingly misrepresented material facts regarding the Heart Rate Defect in the PurePulse Trackers with an intent to mislead Plaintiff Urban and Wisconsin Subclass members.

209. Fitbit’s unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Plaintiff Urban, and are presumed to have deceived Wisconsin Subclass members.

210. Fitbit knew, should have known, or was reckless in not knowing that its products did not have the qualities, characteristics, and functions it represented, warranted, and advertised them to have.

211. Fitbit had an ongoing duty to refrain from unfair and deceptive trade practices.

212. Fitbit’s violations affect the public interest and present a continuing risk to Plaintiff Urban, Wisconsin Subclass members, and the public.

213. Plaintiff Urban and the Wisconsin Subclass suffered ascertainable loss caused by Fitbit’s misrepresentations and its concealment of and failure to disclose material information regarding the Heart Rate Defect in the PurePulse Trackers.

214. Plaintiff Urban and Wisconsin Subclass members were injured as a direct and proximate result of Fitbit’s conduct in that they purchased PurePulse Trackers they would have not otherwise purchased, or would have paid significantly less for, and did not receive the benefit of their bargain.

215. Plaintiff Urban and the Wisconsin Subclass seek monetary relief and other relief provide for under Wis. Stat. § 100.18(11)(b)(2), including treble damages, because Fitbit committed its deceptive and unfair practices knowingly and/or intentionally.

216. Plaintiff Urban and the Wisconsin Subclass also seek court costs and attorneys’ fees under Wis. Stat. § 100.18(11)(b)(2).

**PRAYER FOR RELIEF**

Plaintiffs, individually and on behalf of all others similarly situated, request the Court to
enter judgment against Fitbit, as follows:

A. an order certifying an appropriate Class and/or Subclasses, designating Plaintiffs as Class Representatives, and designating their counsel of record jointly as Class Counsel;

B. an order enjoining Fitbit from engaging in further deceptive distribution and sales practices with respect to the PurePulse Trackers;

C. a declaration that Fitbit is financially responsible for notifying all Class members about the true nature of the PurePulse Trackers;

D. an order requiring Fitbit to notify the Class that the PurePulse Trackers are defective and cannot consistently record accurate heart rates;

E. an order permitting Plaintiffs and Class members to elect to affirm their contracts or alternatively demand rescission and seek damages;

F. a declaration that the Fitbit must disgorge, for the benefit of Plaintiffs and Class members, all or part of the ill-gotten profits received from the sale or lease of the PurePulse Trackers, and make full restitution to Plaintiffs and Class members;

G. Restitution in the amount of monies paid by Plaintiffs and Class members for the PurePulse Trackers;

H. an award to Plaintiffs and Class members of compensatory, exemplary, punitive, and statutory penalties and damages as allowed by law, including interest, in an amount to be proven at trial;

I. an award of attorneys’ fees and costs, as allowed by law;

J. an award of pre-judgment and post-judgment interest, as provided by law;

K. leave to amend this Complaint to conform to the evidence produced at trial; and

L. such other relief as may be appropriate under the circumstances.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs, individual and on behalf of the Class, demand a trial by jury of any and all issues in this action so triable of right.
Dated: January 5, 2015

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

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Attorneys for Plaintiffs
The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

CIVIL COVER SHEET

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<tr>
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<td>(b) County of Residence of First Listed Plaintiff</td>
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<td>(EXCEPT IN U.S. PLAINTIFF CASES)</td>
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<td>(c) Attorneys (Firm Name, Address, and Telephone Number)</td>
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<td>☐ 2 U.S. Government Defendant</td>
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<td>☐ 3 Federal Question (U.S. Government Not a Party)</td>
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<td>☐ 4 Diversity (Indicate Citizenship of Parties in Item III)</td>
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<th>V. ORIGIN (Place an “X” in One Box Only)</th>
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<tr>
<td>☐ 1 Original Proceeding</td>
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<td>☐ 2 Removal from State Court</td>
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<td>☐ 3 Remand from Appellate Court</td>
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<td>☐ 4 Reinstated or Reopened</td>
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<td>☐ 5 Transferred from Another District</td>
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<td>☐ 6 Multidistrict Litigation</td>
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<th>VI. CAUSE OF ACTION</th>
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<tr>
<td>Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):</td>
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<th>VII. REQUESTED IN COMPLAINT:</th>
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<tr>
<td>☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.</td>
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<td>DEMAND $ &gt;$5,000,000.00</td>
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<th>VIII. RELATED CASE(S) IF ANY (See instructions):</th>
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<td>JUDGE</td>
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<th>IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)</th>
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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44
Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting numbers and the corresponding judge names for such cases.

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below:

- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.

- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.
EXHIBIT A
November 16, 2015

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. Andy Missan, VP and General Counsel
Fitbit, Inc.
405 Howard Street, Suite 550
San Francisco, CA 94105

Registered Agent
CT Corporation
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

RE: Notice Concerning Deceptive Practice under the California Consumer Legal Remedies Act

Dear Mr. Missan:

Together with my co-counsel Robert Klonoff, I write on behalf of our client Kate Mclellan to provide written notice pursuant to the California Consumer Legal Remedies Act, California Civil Code Section 1750 et seq. (the “CLRA”), and specifically, Sections 1782(a)(1) and (2). On behalf of herself and all others similarly situated (the “Proposed Class”), Ms. Mclellan hereby notifies you that Fitbit, Inc. (“Fitbit”) is alleged to have violated the CLRA and engaged in unfair, deceptive, fraudulent, and other unlawful conduct by falsely advertising its Fitbit “Charge HR” and “Surge” models, which employ the same PurePulse™ technology (the “Fitbit PurePulse Models”), as detailed below. This letter also serves to provide any required notice that Fitbit has breached express and/or implied warranties with respect to the Fitbit PurePulse Models.

Ms. Mclellan purchased her Fitbit Charge HR on February 27, 2015, at Sports Chalet in Temecula, California. The watch retailed for $149.95 and cost her $161.94 after tax.

Fitbit has engaged—and is engaged—in an extensive and widespread advertising campaign in which it expressly represents and markets the Fitbit PurePulse Models based upon their purported ability to accurately record heart rates, even during high intensity workouts. For example, Fitbit represents to consumers that the heart rate monitors “measure heart rate automatically and continuously” and allow users to “accurately track workout intensity.”
Similarly, Fitbit advertises the Fitbit PurePulse Models with slogans such as: “The Difference Between Good and Great...Is Heart”; “For Better Fitness, Start with Heart”; “Get More Benefits with Every Beat—Without An Uncomfortable Chest Strap”; and “Every Beat Counts.” Importantly, those advertisements depict users utilizing the heart rate function of their watches in a variety of high intensity exercises. Fitbit charges a premium for the heart rate function, as demonstrated by the $20 price differential between the Charge and Charge HR which are distinguished only by the PurePulse technology.

In fact, as Ms. Mclellan and many other purchasers of the Fitbit PurePulse Models have discovered, the heart rate monitor feature Fitbit advertises the Fitbit PurePulse Models as having—and for which it charges a price premium—fails to accurately record heart rates, particularly during high intensity exercise. Ms. Mclellan has observed this inaccuracy during a wide range of activities and exercises. Upon informing Fitbit of these problems, Ms. Mclellan was instructed to reboot her Fitbit PurePulse Model and to heed user manual instructions. She did both, to no effect.

Upon information and belief, this defect is well known to Fitbit, as it has received scores of complaints regarding the inability of the Fitbit PurePulse Models to accurately measure heart rates, and has conceded to at least some complainants that the heart rate monitors are accurate only at rest. Accordingly, it appears Fitbit knowingly manufactured and sold, and continues to sell, the PurePulse Models with a known defect and that do not function as expressly represented and warranted. Fitbit thus misrepresented the nature and characteristics of the Fitbit PurePulse Models and knowingly omitted and failed to disclose the presence of the defect to Ms. Mclellan and the Proposed Class.

Fitbit’s conduct as summarized here constitutes a violation of Cal. Civ. Code § 1770(a); specifically, Fitbit violated—and continues to violate—the CLRA by, among other things:

1. Representing through advertising, warranties, and other express representations, that the Fitbit PurePulse Models had characteristics, benefits, or uses that they did not have;
2. Falsely representing that the Fitbit PurePulse Models are of a particular standard, quality, and/or grade when they are of another;
3. Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve;
4. Advertising the Fitbit PurePulse Models with the intent not to sell them as advertised;
5. Failing to disclose that the Fitbit PurePulse Models have a defect, which is a material fact, the omission of which tends to mislead or deceive the
consumer, and a fact that could not reasonably be known by the consumer;

6. Failing to disclose the Fitbit PurePulse Models’ defect with the intent that consumers rely on the concealment or omission in connection with their decisions to purchase the subject heart rate watches;

7. Failing to properly repair the Fitbit PurePulse Models to correct or eliminate the defect; and

8. Other unfair or deceptive conduct or practices in trade or commerce with respect to the marketing, advertising, sale and warranty/customer service of the Fitbit PurePulse Models.

Fitbit’s conduct also violates California’s Unfair Competition Law, California Business and Professions Code Section 17200, and constitutes common law fraud, fraudulent inducement to contract, and breach of express and implied warranties.

Ms. Mclellan and the Proposed Class have all suffered actual damages as a result of this conduct, including but not limited to, the original cost of the Fitbit PurePulse Models and/or the premium paid for them. Notably, for many purchasers who use their Fitbit PurePulse Models to monitor heart rate for medical and/or health reasons, the failure of the Fitbit PurePulse Models to accurately measure heart rate poses a health and safety risk as well.

Ms. Mclellan and the Proposed Class hereby demand that within thirty (30) days of receiving this letter, Fitbit agree to (1) cease all false and misleading statements and advertising of the heart rate monitoring feature of the Fitbit PurePulse Models and (2) offer all Proposed Class members the option to either return their Fitbit PurePulse Models for a full refund or, alternatively, to retain the watches and receive a refund of the difference in price between the Fitbit PurePulse Models and those models without the heart rate monitoring feature. Unless Fitbit agrees to do so within the thirty-day timeframe, we intend to bring claims for damages as permitted by Cal. Civ. Code § 1782(d) in addition to our claims of equitable, injunctive, and other relief available under applicable law, and for attorneys’ fees.

Finally, a note regarding forced arbitration, class action bans, and limitations on statutes of limitation. Any attempt by Fitbit to prohibit Ms. Mclellan and Proposed Class members from vindicating their substantive statutory rights under California law, and their constitutional rights to a jury trial and to petition for redress, through post-purchase imposition of an undisclosed arbitration clause, class action ban, and claim period limitation, is legally invalid and unenforceable as a matter of law. Whatever the enforceability of such clauses on consumers who purchased their Fitbit PurePulse Models directly from Fitbit’s website, Proposed Class members—including Ms. Mclellan—who did not purchase their watches directly from Fitbit but instead through third party vendors (either in-person or on-line) did not agree to arbitrate at the time they purchased their Fitbit PurePulse Models. Nothing on any of the presale marketing or displays available at such vendors, nor the product packaging itself,
disclosed or directed these Proposed Class members to any terms of service including such provisions. Nor were Proposed Class members provided any advance notice that a post-purchase agreement to such terms would be necessary to enable them to “use their activity tracker as intended” or to activate the devices’ most basic functions, a fact your Vice President for Customer Support attested to under oath. (See Ex. A hereto). Those post-purchase clauses are therefore invalid and unenforceable as to Ms. Mclellan and Proposed Class members, and may themselves evidence and constitute an unfair and deceptive business practice and fraudulent scheme to defraud consumers and/or deceive them into waiving their rights.

We sincerely hope to confer with you to resolve these violations without the need for litigation. I invite you to contact me to discuss this demand at any time. I can be reached at (212) 355-9500 or jselbin@lcb.com. I look forward to hearing from you.

Very truly yours,

Jonathan D. Selbin

JDS/krb

cc: Robert Klonoff
    Elizabeth Cabraser
    Kevin Budner

1280554.4
EXHIBIT A
Case No. 3:15-cv-2077-JD

DECLARATION OF ERIN M. BOSMAN 
IN SUPPORT OF DEFENDANT 
FITBIT, INC.'S MOTION TO COMPEL 
ARBITRATION AND DISMISS 
LITIGATION 

Date: November 4, 2015 
Time: 10:00 a.m. 
Ctm: 11, 19th Floor 

The Honorable James Donato 

Date Action Filed: May 8, 2015
I, ERIN M. BOSMAN, hereby declare as follows:

1. I am an attorney admitted to practice in the State of California and am a member of good standing in the state bar. I am a partner with the law firm of Morrison & Foerster LLP, and counsel of record for Defendant Fitbit, Inc. ("Fitbit") in the above captioned action. Statements made in this Declaration are based on my personal knowledge, and I could and would so testify if called as a witness in this matter.

2. Before this Motion to Compel Arbitration was filed, I informed Plaintiff Mallick's counsel at Dworken & Bernstein Co. L.P.A. via correspondence that claims relating to the Fitbit Charge HR™ ("Charge HR") were subject to arbitration.

3. I explained to Plaintiff's counsel that Fitbit would file a motion to compel arbitration if Plaintiff's counsel did not agree to arbitrate Ms. Mallick's dispute relating to the Charge HR. In addition, I explained to Plaintiff's Counsel that Ms. Mallick assented to the class action waiver in Fitbit's Terms of Service.

4. Attached as Exhibit 1 is a true and correct copy of the letter sent to Dworken & Bernstein Co., L.P.A., on September 8, 2015, notifying Plaintiff's Counsel that Fitbit's records indicate that Ms. Mallick agreed to the Terms of Service, including the following two provisions: (1) "You and Fitbit agree to resolve any Disputes through final and binding arbitration, except as set forth under Exceptions to Agreement to Arbitrate below" and (2) "You may only resolve Disputes with Fitbit on an individual basis and may not bring a claim as a plaintiff or a class member in a class, consolidate, or representative action. Class arbitrations, class action, private attorney general action, and consolidation with other arbitrations aren't allowed under our agreement."

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of September, 2015, in San Francisco, California.

/s/ Erin M. Bosman
Erin M. Bosman

Handout 2 - FitBit Complaint
December 16, 2015

Via E-Mail and U.S. Mail

Jonathan D. Selbin
Lieff Cabraser Heimann & Bernstein
250 Hudson Street, 8th Floor
New York, NY 10013-1413

Re: Fitbit’s Response to Mclellan CLRA Demand Letter

Dear Mr. Selbin:

We represent Fitbit, Inc., and write in response to your November 16, 2015 letter to Fitbit’s General Counsel Andy Missan, on behalf of Kate Mclellan (attached hereto as Exhibit A).

As you are aware from Erin Bosman’s letter to Frank Bartela of September 8, 2015 (which is attached to your November 16 letter), the Fitbit Terms of Service include an agreement to arbitrate, as well as a class action waiver. Accordingly, your desire to resolve Ms. Mclellan’s grievance without litigation is well-placed. In fact, Ms. Mclellan cannot litigate her claim and cannot represent a class. Instead, any dispute she has with Fitbit is subject to arbitration.

In your letter, you contend that the post-purchase agreement to arbitrate is invalid and unenforceable. That is incorrect. On November 10, 2015, the Honorable James Donato heard these very issues in Brickman v. Fitbit, Inc. and found that Fitbit’s arbitration agreement was valid and enforceable.

In Brickman, the plaintiff, Stephanie Mallick, had purchased a Charge HR product in January 2015. Accordingly, she had been presented with, and accepted, the Terms of Service including the arbitration agreement and class action waiver. Nevertheless, she argued that because the agreement was presented to her after purchase, there was no consideration.

Ninth Circuit precedent holds otherwise. See Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002). Circuit City holds that the defendant’s reciprocal “promise to submit to arbitration and to forego the option of a judicial forum for a specified class of claims constitutes sufficient consideration.

sd-673224
Judge Donato agreed. In response to plaintiff’s contention that the arbitration clause was unenforceable, he stated that “I don’t think you have a leg to stand on.” He went on to explain: “The arbitration clause here is bilateral. It has a 30-day opt-out. It has Fitbit paying – picking up the tab up to $75,000, and waiving attorneys’ fees – all of that under current Ninth Circuit law says that’s perfectly fine.” (Brickman v. Fitbit, Inc., No. 3:15-cv-2077-JD, Hearing Tr. (N.D. Cal. Nov. 10, 2015), at 6:17-7:2.)

Your client is in the exact same position as Ms. Mallick. In fact, all Charge HR and Surge users are bound by the arbitration agreement and class action waiver, and will be compelled to individually arbitrate similar claims—or any other claims for that matter—against Fitbit.

Fitbit also has strong defenses on the merits of your client’s claims, but addresses here only the threshold issue of arbitration and reserves the right to raise these defenses in the appropriate forum.

Should your client wish to have her grievances heard despite their lack of merit, she is welcome to initiate arbitration against Fitbit in accordance with the Terms of Service she agreed to. Please let us know if this is how she would like to proceed. We would be happy to work with you to facilitate the process, including Fitbit’s payment of arbitration fees as specified in the Terms of Service, assuming that your client’s individual claim is less than $75,000.

Please let us know if you have any questions or would like to discuss the matter further.

Sincerely,

Erin M. Bosman

Attachment

cc: William L. Stern
    Julie Y. Park
November 16, 2015

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. Andy Missan, VP and General Counsel
Fitbit, Inc.
405 Howard Street, Suite 550
San Francisco, CA 94105

Registered Agent
CT Corporation
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

RE: Notice Concerning Deceptive Practice under the California Consumer Legal Remedies Act

Dear Mr. Missan:

Together with my co-counsel Robert Klonoff, I write on behalf of our client Kate McLellan to provide written notice pursuant to the California Consumer Legal Remedies Act, California Civil Code Section 1750 et seq. (the “CLRA”), and specifically, Sections 1782(a)(1) and (2). On behalf of herself and all others similarly situated (the “Proposed Class”), Ms. McLellan hereby notifies you that Fitbit, Inc. (“Fitbit”) is alleged to have violated the CLRA and engaged in unfair, deceptive, fraudulent, and other unlawful conduct by falsely advertising its Fitbit “Charge HR” and “Surge” models, which employ the same PurePulse™ technology (the “Fitbit PurePulse Models”), as detailed below. This letter also serves to provide any required notice that Fitbit has breached express and/or implied warranties with respect to the Fitbit PurePulse Models.

Ms. McLellan purchased her Fitbit Charge HR on February 27, 2015, at Sports Chalet in Temecula, California. The watch retailed for $149.95 and cost her $161.94 after tax.

Fitbit has engaged—and is engaged—in an extensive and widespread advertising campaign in which it expressly represents and markets the Fitbit PurePulse Models based upon their purported ability to accurately record heart rates, even during high intensity workouts. For example, Fitbit represents to consumers that the heart rate monitors “measure heart rate automatically and continuously” and allow users to “accurately track workout intensity.”
Similarly, Fitbit advertises the Fitbit PurePulse Models with slogans such as: "The Difference Between Good and Great...Is Heart"; "For Better Fitness, Start with Heart"; "Get More Benefits with Every Beat—Without An Uncomfortable Chest Strap"; and "Every Beat Counts." Importantly, those advertisements depict users utilizing the heart rate function of their watches in a variety of high intensity exercises. Fitbit charges a premium for the heart rate function, as demonstrated by the $20 price differential between the Charge and Charge HR which are distinguished only by the PurePulse technology.

In fact, as Ms. McLellan and many other purchasers of the Fitbit PurePulse Models have discovered, the heart rate monitor feature Fitbit advertises the Fitbit PurePulse Models as having—and for which it charges a price premium—fails to accurately record heart rates, particularly during high intensity exercise. Ms. McLellan has observed this inaccuracy during a wide range of activities and exercises. Upon informing Fitbit of these problems, Ms. McLellan was instructed to reboot her Fitbit PurePulse Model and to heed user manual instructions. She did both, to no effect.

Upon information and belief, this defect is well known to Fitbit, as it has received scores of complaints regarding the inability of the Fitbit PurePulse Models to accurately measure heart rates, and has conceded to at least some complainants that the heart rate monitors are accurate only at rest. Accordingly, it appears Fitbit knowingly manufactured and sold, and continues to sell, the PurePulse Models with a known defect and that do not function as expressly represented and warranted. Fitbit thus misrepresented the nature and characteristics of the Fitbit PurePulse Models and knowingly omitted and failed to disclose the presence of the defect to Ms. McLellan and the Proposed Class.

Fitbit's conduct as summarized here constitutes a violation of Cal. Civ. Code § 1770(a); specifically, Fitbit violated—and continues to violate—the CLRA by, among other things:

1. Representing through advertising, warranties, and other express representations, that the Fitbit PurePulse Models had characteristics, benefits, or uses that they did not have;
2. Falsely representing that the Fitbit PurePulse Models are of a particular standard, quality, and/or grade when they are of another;
3. Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve;
4. Advertising the Fitbit PurePulse Models with the intent not to sell them as advertised;
5. Failing to disclose that the Fitbit PurePulse Models have a defect, which is a material fact, the omission of which tends to mislead or deceive the
consumer, and a fact that could not reasonably be known by the consumer;

6. Failing to disclose the Fitbit PurePulse Models’ defect with the intent that consumers rely on the concealment or omission in connection with their decisions to purchase the subject heart rate watches;

7. Failing to properly repair the Fitbit PurePulse Models to correct or eliminate the defect; and

8. Other unfair or deceptive conduct or practices in trade or commerce with respect to the marketing, advertising, sale and warranty/customer service of the Fitbit PurePulse Models.

Fitbit's conduct also violates California's Unfair Competition Law, California Business and Professions Code Section 17200, and constitutes common law fraud, fraudulent inducement to contract, and breach of express and implied warranties.

Ms. McLellan and the Proposed Class have all suffered actual damages as a result of this conduct, including but not limited to, the original cost of the Fitbit PurePulse Models and/or the premium paid for them. Notably, for many purchasers who use their Fitbit PurePulse Models to monitor heart rate for medical and/or health reasons, the failure of the Fitbit PurePulse Models to accurately measure heart rate poses a health and safety risk as well.

Ms. McLellan and the Proposed Class hereby demand that within thirty (30) days of receiving this letter, Fitbit agree to (1) cease all false and misleading statements and advertising of the heart rate monitoring feature of the Fitbit PurePulse Models and (2) offer all Proposed Class members the option to either return their Fitbit PurePulse Models for a full refund or, alternatively, to retain the watches and receive a refund of the difference in price between the Fitbit PurePulse Models and those models without the heart rate monitoring feature. Unless Fitbit agrees to do so within the thirty-day timeframe, we intend to bring claims for damages as permitted by Cal. Civ. Code § 1782(d) in addition to our claims of equitable, injunctive, and other relief available under applicable law, and for attorneys’ fees.

Finally, a note regarding forced arbitration, class action bans, and limitations on statutes of limitation. Any attempt by Fitbit to prohibit Ms. McLellan and Proposed Class members from vindicating their substantive statutory rights under California law, and their constitutional rights to a jury trial and to petition for redress, through post-purchase imposition of an undisclosed arbitration clause, class action ban, and claim period limitation, is legally invalid and unenforceable as a matter of law. Whatever the enforceability of such clauses on consumers who purchased their Fitbit PurePulse Models directly from Fitbit’s website, Proposed Class members—including Ms. McLellan—who did not purchase their watches directly from Fitbit but instead through third party vendors (either in-person or on-line) did not agree to arbitrate at the time they purchased their Fitbit PurePulse Models. Nothing on any of the presale marketing or displays available at such vendors, nor the product packaging itself,
Andy Missan  
November 16, 2015  
Page 4

disclosed or directed these Proposed Class members to any terms of service including such provisions. Nor were Proposed Class members provided any advance notice that a post-purchase agreement to such terms would be necessary to enable them to “use their activity tracker as intended” or to activate the devices’ most basic functions, a fact your Vice President for Customer Support attested to under oath. (See Ex. A hereto). Those post-purchase clauses are therefore invalid and unenforceable as to Ms. Melellan and Proposed Class members, and may themselves evidence and constitute an unfair and deceptive business practice and fraudulent scheme to defraud consumers and/or deceive them into waiving their rights.

We sincerely hope to confer with you to resolve these violations without the need for litigation. I invite you to contact me to discuss this demand at any time. I can be reached at (212) 355-9500 or jselbin@lehr.com. I look forward to hearing from you.

Very truly yours,

[Signature]

Jonathan D. Selbin

JDS/Krb

cc: Robert Klonoff
    Elizabeth Cabraser
    Kevin Budner

1280554.4
EXHIBIT A
Case 3:15-cv-02077-JD

WILLIAM L. STERN (CA SBN 96105)
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Telephone: 858.720.5100
Fax: 858.720.5125

Attorneys for Defendant
FITBIT, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES P. BRICKMAN, individually and as a representative of all others similarly situated,
Plaintiff,

v.

FITBIT, INC.,
Defendant.

Case No. 3:15-cv-2077-JD

DECLARATION OF ERIN M. BOSMAN
IN SUPPORT OF DEFENDANT
FITBIT, INC.'S MOTION TO COMPEL
ARBITRATION AND DISMISS
LITIGATION

Date: November 4, 2015
Time: 10:00 a.m.
Crm: 11, 19th Floor

The Honorable James Donato

Date Action Filed: May 8, 2015
I, ERIN M. BOSMAN, hereby declare as follows:

1. I am an attorney admitted to practice in the State of California and am a member of good standing in the state bar. I am a partner with the law firm of Morrison & Foerster LLP, and counsel of record for Defendant Fitbit, Inc. ("Fitbit") in the above captioned action. Statements made in this Declaration are based on my personal knowledge, and I could and would so testify if called as a witness in this matter.

2. Before this Motion to Compel Arbitration was filed, I informed Plaintiff Mallick's counsel at Dworken & Bernstein Co. L.P.A. via correspondence that claims relating to the Fitbit Charge HR™ ("Charge HR") were subject to arbitration.

3. I explained to Plaintiff's counsel that Fitbit would file a motion to compel arbitration if Plaintiff's counsel did not agree to arbitrate Ms. Mallick's dispute relating to the Charge HR. In addition, I explained to Plaintiff's Counsel that Ms. Mallick assented to the class action waiver in Fitbit's Terms of Service.

4. Attached as Exhibit 1 is a true and correct copy of the letter sent to Dworken & Bernstein Co., L.P.A., on September 8, 2015, notifying Plaintiff's Counsel that Fitbit's records indicate that Ms. Mallick agreed to the Terms of Service, including the following two provisions: (1) "You and Fitbit agree to resolve any Disputes through final and binding arbitration, except as set forth under Exceptions to Agreement to Arbitrate below" and (2) "You may only resolve Disputes with Fitbit on an individual basis and may not bring a claim as a plaintiff or a class member in a class, consolidate, or representative action. Class arbitrations, class action, private attorney general action, and consolidation with other arbitrations aren't allowed under our agreement."

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of September, 2015, in San Francisco, California.

/s/ Erin M. Bosman
Erin M. Bosman

BOSMAN DECLARATION ISO DEFENDANT FITBIT, INC.'S MOTION TO COMPEL ARBITRATION
Case No. 3:15-cv-2077-JD
September 8, 2015

Via E-Mail

Patrick J. Petrotti  
Frank A. Bartela  
DWORKEN & BEINSTEIN CO., L.P.A.  
60 South Park Place  
Plainesville, Ohio 44077

Re: Demand for Arbitration  
Briksman v. Fitbit Inc., Case No. 3:15-cv-2077

Dear Counsel:

This letter contains Fitbit’s demand for arbitration concerning the claims brought by your client, Stephanie Mallick. Ms. Mallick agreed to arbitrate her claims against Fitbit under Fitbit’s Terms of Service. A copy of the Terms of Service, which were published on Fitbit’s website on December 18, 2014, is attached to this letter at Exhibit A. Specifically, Ms. Mallick agreed to arbitrate on the same day she purchased and paired her Charge HR for the first time; February 4, 2015.

When a Fitbit user sets up an account, the user is prompted to agree to the Terms of Service and the Privacy Policy. A hyperlink allows the customer to review these documents before agreeing to their terms. The user must then affirmatively check the box indicating, “I agree to the Terms of Service and the Privacy Policy.”

In the Dispute Resolution section of the Terms of Service, there is a heading stating “We Both Agree To Arbitrate.” The text below this bolded heading reads, “You and Fitbit agree to resolve any Disputes through final and binding arbitration, except as set forth under Exceptions to Agreement to Arbitrate below.”¹ Directly below the agreement to arbitrate,

¹ The Agreement to Arbitrate in the Terms of Service has two exceptions for customers with claims under a certain monetary threshold. First, they provide an exception to arbitration for claims brought in small claims court. Second, under the Terms of Sale, Fitbit provides that if “will pay all arbitration fees for claims less than $75,000.” (Id.) Neither applies to Ms. Mallick’s claims.
there is another heading explaining how to “Opt-out of Agreement to Arbitrate.” This opt-out section allows that “you can decline this agreement to arbitrate by contacting legal@fitbit.com within 30 days of first accepting these Terms and stating that you (include your first and last name) decline this arbitration agreement.” The Terms of Service provide that the “American Arbitration Association (AAA) will administer the arbitration under its Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes.”

Ms. Mallick also agreed that she would not bring a claim as a plaintiff or a class member in a class. Under the Dispute Resolution section there is a heading “No Class Actions.” This section provides: “You may only resolve Disputes with Fitbit on an individual basis and may not bring a claim as a plaintiff or a class member in a class, consolidate, or representative action. Class arbitrations, class action, private attorney general action, and consolidation with other arbitrations aren’t allowed under our agreement.”

Ms. Mallick agreed to the terms of service and she is bound by them. She did not opt out of the arbitration procedures.

Please confirm that you will dismiss Ms. Mallick as a plaintiff from the above referenced case. Otherwise, we will be forced to move to compel individual arbitration of her claims.

Sincerely,

[Signature]

Erin M. Bosman

Attachment

cc: William L. Stern
James W. Huston
Julie Y. Park
No. 13-1339

IN THE
Supreme Court of the United States

SPOKEO, INC.,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE EBAY INC.,
FACEBOOK, INC., GOOGLE INC.,
IAC/INTERACTIVECORP, LINKEDIN CORP.,
NETFLIX, INC., TWITTER, INC., YAHOO! INC.,
THE CONSUMER ELECTRONICS ASSOCIATION,
DIGITAL CONTENT NEXT, AND THE INTERNET
ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are leading media and technology companies that provide a wide variety of services via the Internet to hundreds of millions of users each day.

eBay Inc., with 157 million active buyers globally and more than 800 million items listed for sale, is one of the world’s largest online marketplaces, where practically anyone can buy and sell practically anything. Founded in 1995, eBay connects a diverse and passionate community of individual buyers and sellers, as well as small businesses, whose collective impact on e-commerce is staggering.

Facebook, Inc. provides a free social media service to more than 1.4 billion people that empowers them to connect with others, to discover what is happening in their communities, and to share their views on the world. The service is now provided in over 100 languages and dialects.

Google Inc. is a technology company that offers a suite of web-based products and services to billions of people worldwide. Google’s search engine processes more than 3.5 billion searches per day and more than 1 trillion searches per year. Google’s Gmail service provides email for 900 million global users. Google Maps is used by more than 1 billion people each month.

IAC/InterActiveCorp is a diversified online media company with more than 150 brands and products.

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1 Pursuant to Rule 37.6, amici certify that no counsel for either party authored this brief, and no person or party other than named amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent have been filed with the Clerk.
IAC’s businesses are leaders in numerous sectors of the Internet economy and include Match.com, OkCupid, Ask.com, About.com, HomeAdvisor, The Daily Beast, Investopedia, and Vimeo. IAC’s family of websites receive more than 2.5 billion visits each month from users in over 200 countries.

LinkedIn Corp. hosts the world’s largest professional network, with more than 364 million members in over 200 countries and territories globally, including more than 115 million members in the United States. LinkedIn’s mission is to connect the world’s professionals to make them more productive and successful, and LinkedIn members have access to people, jobs, news, updates, and insights that help them be great at what they do.

Netflix, Inc. is a pioneer in the delivery of movies and television over the Internet and is now the world’s leading Internet television network. Netflix has more than 62 million subscribers in over 50 countries who watch more than 100 million hours of television shows and movies per day, including original series, documentaries, and films.

Twitter, Inc. offers a free service to more than 300 million active monthly users that allows them to connect with others, express ideas, and discover new information. Roughly 500 million short messages (known as “Tweets”) are posted on Twitter every day.

Yahoo! Inc., together with its consolidated subsidiaries, is a guide focused on making users’ digital habits inspiring and entertaining. By creating highly personalized experiences for its users, Yahoo keeps people connected to what matters most to them across devices and around the world. In 2014, Yahoo’s global user
base across search, communications, and digital content grew to more than 1 billion monthly active users.

The Consumer Electronics Association (CEA) is the preeminent technology trade association promoting growth in the $208 billion U.S. consumer electronics industry through market research, education, and public policy representation. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology multimedia, and accessory products, as well as related services sold to consumers.\(^2\)

Digital Content Next is a trade association that represents high-quality digital content companies, including some of the world’s most well-known and respected media brands, such as The Associated Press, ESPN, The Financial Times, Fox News, The New York Times, National Public Radio, and The Washington Post.\(^3\)

The Internet Association represents the interests of thirty-five leading Internet companies. It seeks to protect Internet freedom, promote innovation and economic growth, and empower customers and users.\(^4\)

The services and technology offered by amici have created or transformed a wide range of industries, including electronic communications in all forms, financial

\(^2\) A list of the CEA’s members is available at https://www.ce.org/Membership/Membership-Directory.aspx.

\(^3\) A list of Digital Content Next’s members is available at https://digitalcontentnext.org/membership/members/.

\(^4\) A list of the Internet Association’s members is available at http://internetassociation.org/our-members/.
transactions and online commerce, social networking, the generation and delivery of media content, and the organization and accessibility of information. Amici are proven innovators that continue to generate valuable technology and services through significant investments in research and development. The volume and type of communications and interactions that amici’s technologies facilitate, however, make amici disproportionately susceptible to the consequences of the Ninth Circuit’s misreading of Article III’s injury-in-fact requirement. Amici’s activities may fall within the ambit of many federal and state laws that confer private causes of action and contain statutory damages provisions similar to the provisions at issue in this case. Indeed, in recent years, amici have increasingly been subjected to litigation under these types of statutes, in which the only “harm” alleged is a bare statutory violation.

Thus, amici are concerned that the Article III standing rule adopted by the Ninth Circuit, which allows plaintiffs to bring suits in federal court based on nothing more than an allegation of a bare statutory violation without any requirement of actual harm, is contrary to this Court’s precedent and renders technology companies, including amici, uniquely vulnerable to baseless and abusive litigation. Amici, and the billions of individuals they serve worldwide (often with free or very low-cost services), thus have an interest in this Court reaffirming the injury-in-fact requirement. Accordingly, amici ask that this Court confirm that Article III standing exists only when the plaintiff alleges concrete, actual harm, and reverse the judgment below.⁵

⁵ Amici’s interest in this case is limited to the Article III standing question presented and should not be construed as expressing any view on the merits of petitioner’s alleged statutory violations.
SUMMARY OF ARGUMENT

Amici provide a wide variety of innovative and important services that rely on highly sophisticated computer programming and systems to serve millions of people each day. These systems are essential to amici’s ability to automatically process and facilitate billions of complex transactions and interactions efficiently for people across the globe. This automation enables amici to unlock the power of modern communications technology to deliver immense value to users, usually at no or very little cost. But this model, which is deployed by amici on an immense scale, also makes amici and similar businesses uniquely vulnerable to the untoward consequences of the Ninth Circuit’s misreading of Article III.

The services and products amici provide may be subject to federal and state laws that confer private rights of action and contain statutory damages provisions similar to the provisions in the Fair Credit Reporting Act (FCRA) at issue in this case. These statutes include the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522, the Stored Communications Act, id. §§ 2701-2712, the Video Privacy Protection Act, id. § 2710, and the Telephone Consumer Protection Act, 47 U.S.C. § 227. Amici are frequently targeted by opportunistic lawsuits based on alleged violations of these and similar statutes, in which the only alleged harm is a bare statutory violation—an injury-in-law, not an injury-in-fact. Rather than requiring concrete, actual harm to establish a “case or controversy” appropriate for judicial resolution, the Ninth Circuit’s reasoning in this and other cases allows such suits for bare statutory violations to proceed with no limiting principle. Amici ask the Court to reverse the Ninth Circuit and clarify that Article III standing requires an allegation of actual injury.
Amici are concerned that the misguided Article III standing jurisprudence embodied by the decision below creates incentives for plaintiffs to pursue such no-injury lawsuits in federal court with increased frequency, with a concomitant increase in the negative effects these suits have on the technology industry. Permitting these abusive no-injury lawsuits to proceed beyond the pleading stage has a particularly negative impact on amici due to the broad scale of their operations. Amici’s successful innovations and use of easily replicated computer processes allow billions of people to benefit from the valuable services and products they provide, usually at little or no cost to consumers. Yet, under the Ninth Circuit’s standing rule, if any of the millions of individuals who interact with amici each day is willing (or is enticed by the plaintiffs’ bar) to allege that a generalized act or practice by amici violated a statute that provides a private cause of action and statutory damages, she can, without more, launch a putative class action on behalf of herself and millions of other “similarly situated” users. Exploiting the lax Ninth Circuit standing rule, a named plaintiff in such a suit can (and, as explained below, often does) pursue a multi-billion dollar statutory damages claim despite the lack of any actual injury to herself or any other class member. Even without pursuing a class action, a single plaintiff who suffered no injury could attempt to obtain punitive damages through an individual suit under FCRA or other similarly structured statutes, or the injunctive relief that is available under many other statutes that also provide for statutory damages.

The rigors of Article III must be applied to these suits in the same way they are applied to any other lawsuit brought in federal court—the plaintiffs must allege an actual, redressable injury. If the injury re-
requirement does not apply, then companies like amici will continue to be wrongly subjected to the substantial expense of defending such actions and the risks of massive class-wide statutory damages or burdensome injunctive relief, creating a strong incentive to settle even the most frivolous suits. That creates a perverse incentive that rewards plaintiffs (and their attorneys) for filing meritless strike suits in circumstances where not a single person has been harmed. Article III’s standing requirement exists to prevent precisely this result.

ARGUMENT

I. THE ARTICLE III STANDING REQUIREMENT IS FUNDAMENTAL TO THE INVOCATION OF FEDERAL JUDICIAL POWER

A. Article III Standing Requires An Actual Injury

“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” Raines v. Byrd, 521 U.S. 811, 818 (1997). To meet the case or controversy requirement, a plaintiff’s complaint “must establish that [the plaintiff] ha[s] standing to sue.” Id. To have standing, “the plaintiff must have suffered an ‘injury in fact’” which is both “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982) (“The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is … restricted to litigants who can show ‘injury in fact’ resulting from the action which they seek to have the court adjudicate.”). Thus, the injury-in-fact alleged in a plaintiff's
complaint “must affect the plaintiff in a personal and individual way.” *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 n.1 (emphasis added); *see also id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way.”).

Respondent Robins’s putative class complaint alleges that Spokeo is a credit reporting agency that willfully violated various provisions of FCRA (Pet. App. 2a, 19a-20a), which provides consumers with a private right of action to recover “any actual damages ... or damages of not less than $100 and not more than $1,000” for any willful failure to comply with the various requirements imposed by the Act, 15 U.S.C. § 1681n(1)(A) (emphasis added). Robins seeks statutory damages for himself and a putative class that allegedly “consists of millions of individuals.” Pet. 15. The district court dismissed the complaint for lack of Article III standing because Robins had not alleged “any actual or imminent harm.” Pet. App. 13a. The Ninth Circuit reversed, holding that Robins had standing because “alleged violations of [his] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III.” *Id.* 8a. The Ninth Circuit’s holding follows its earlier decision in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), a case in which this Court’s grant of certiorari was later dismissed as improvidently granted, 132 S. Ct. 2536 (2012). The decision below is also consistent with subsequent precedent from the Ninth Circuit. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) (rejecting argument that “plaintiffs lack standing because they have not suffered any concrete or particularized injury” and holding that “a plaintiff demonstrates an injury sufficient to satisfy Article III when bringing a claim under
a statute that prohibits the defendant’s conduct and grants persons in the plaintiff’s position a right to judicial relief” (internal quotation marks omitted)).

By allowing plaintiffs to maintain lawsuits in federal court based solely upon injuries-in-law and in the absence of any actual harm, the Ninth Circuit’s rule contravenes this Court’s longstanding precedent that, “[i]n order to satisfy Art[icle] III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This Court’s holdings make plain that Congress cannot confer Article III standing through legislation. While Congress has the authority to create legal remedies for actual “de facto injuries” that were not previously recognized in law, *Lujan v. Defenders of Wildlife*, 504 U.S. at 578, it is also “settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing,” *Raines*, 521 U.S. at 820 n.3. See also *Gladstone, Realtors*, 441 U.S. at 100 (“[I]n no event, however, may Congress abrogate the Art[icle] III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself,’ that is likely to be redressed if the requested relief is granted.” (citation omitted)). “[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).6

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6 The question presented in this case implicates not only Article III standing for bare violations of federal statutes that cause no actual harm, but also the ability of federal courts to adjudicate alleged violations of state statutory rights and remedies despite the lack of any actual injury to the plaintiff. The Ninth Circuit’s broad recognition of standing based on alleged injuries-in-law has been
This Court has taught that an actual injury-in-fact is required to invoke the federal judicial power, a constitutional requirement that cannot be abrogated by legislation. But the Ninth Circuit has concluded that Congress’s conferral of a private right of action coupled with a right to judicial relief through statutory damages is sufficient to confer Article III standing without regard to actual injury. Indeed, the court of appeals expressly disclaimed any analysis of whether the alleged statutory violations in this case caused palpable injury or actual harm to Robins, such as “harm to his employment prospects or related anxiety.” Pet. App. 9a n.3. Just as this Court has previously found plaintiffs’ complaints lacking when they allege a bare violation of law that causes no actual harm, the Court should conclude here that Robins’s bare allegation of a statutory violation, without more, is insufficient to confer Article III standing, without more, is insufficient to confer Article III standing. E.g., Summers v. Earth Island Inst., 555 U.S. at 496 (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation … is insufficient to create Article III standing.”); Lujan v. Defenders of Wildlife, 504 U.S. at 572 (procedural injury does not confer standing unless it also “impair[s] a separate concrete interest”); Valley Forge, 454 U.S. at 485 (plaintiffs’ “claim that the Constitution has been violated” is insufficient to confer standing where plaintiff failed to “identify any personal injury suffered by them as a consequence of the alleged constitutional error”).

applied to state law claims alleging bare violations of state statutes with no allegation of actual harm, see infra pp.18-19, and therefore this Court’s resolution of the Article III standing question presented in this case could have a profound impact on similar state law claims brought in federal courts.
B. The Article III Standing Requirement Protects The Separation Of Powers

The Ninth Circuit’s unduly broad standing rule threatens to undermine the carefully calibrated separation of powers established by the Constitution. It has long been understood that “Art[icle] III standing is built on … the idea of separation of powers.” *Allen v. Wright*, 468 U.S. 737, 752 (1984); see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (recognizing that standing doctrine derives from “separation-of-powers principles”). The Founders envisioned the federal judiciary as a forum of “‘last resort’” to settle concrete disputes. *Allen*, 468 U.S. at 752. This Court has previously rejected the contention that private plaintiffs may “roam the country in search of … wrongdoing” in order “to reveal their discoveries in federal court” because “[t]he federal courts were simply not constituted as ombudsmen of the general welfare.” *Valley Forge*, 454 U.S. at 487. The power and responsibility to enforce the law belong to the political branches—in particular, the Executive Branch, upon which the Constitution confers the authority and obligation to ensure “that the Laws be faithfully executed.” U.S. Const. art. II, § 3; see also *United States v. Raines*, 362 U.S. 17, 27 (1960).

In contrast, this Court’s precedents explain that the judicial “power to declare the rights of individuals … is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.” *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). The standing requirement limits the categories of litigants who may invoke the jurisdiction of the federal courts and thus “prevent[s] the judicial process from being used to usurp the powers of the politi-
cal branches.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013). Yet the Ninth Circuit’s broad standing rule empowers private litigants to do just what this Court has prohibited—go out in search of potential violations of state and federal statutes in order to bring their claims in federal court.

This transfer of law enforcement power and authority from the Executive Branch to private litigants who allege no actual injury has important, negative consequences. Significantly, “[v]irtually none of the checks on executive enforcement discretion apply to private parties…. Nor are there political constraints.” Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009); see also id. at 820 (explaining that while “the Executive Branch exercises considerable prosecutorial discretion in fulfilling its constitutional duty to enforce federal law,” it is also “subject to a degree of judicial and congressional oversight”). The Ninth Circuit’s rule transforms private litigants into roving attorneys general who operate with vastly different incentives than actual executive officials and a dearth of safeguards to constrain their conduct, and transforms the federal courts into quasi-administrative or advisory tribunals in which uninjured litigants seek to vindicate abstract legal rights.

II. **Erosion Of The Injury-In-Fact Requirement Invites Abusive Litigation Against Technology Companies**

A. **Courts Following The Ninth Circuit’s Reasoning Routinely Find Standing Based Solely On Alleged Injuries-In-Law**

The Ninth Circuit’s broad holding that any “alleged violation of … statutory rights [is] sufficient to satisfy the injury-in-fact requirement of Article III” (Pet. App. 12
8a) broadly implicates numerous federal and state statutes that confer private rights of action and provide for statutory damages or other forms of relief regardless of demonstrated or alleged harm. By its reasoning and terms, the Ninth Circuit’s rule—and similar rules adopted by other courts of appeals—allows any plaintiff to invoke federal jurisdiction based on the allegation of a “colorable” statutory violation that causes no harm. In practice, this allows plaintiffs to pursue lawsuits seeking billions of dollars in statutory damages, sweeping injunctive relief, and even punitive damages based on novel legal theories or technical statutory violations that are not alleged to have “affect[ed] the plaintiff” or harmed anyone. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 n.1.

Due to the widespread adoption and use of the Internet-based services and related products that amici provide, amici interact with millions of individuals or more each day who use their services to conduct transactions, share information and content, and interact with people all over the world. Indeed, it is the very

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7 For example, the Tenth Circuit has held that “[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” *Day v. Bond*, 500 F.3d 1127, 1136 (10th Cir. 2007) (internal quotation marks omitted); see also *Shaw v. Marriott Int’l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) (“[T]he violation of a statute can create the particularized injury required by Article III ... when ‘an individual right’ has been ‘conferred on a person by statute.’”); but see *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (theory “that the deprivation of [plaintiffs’] statutory right is sufficient to constitute an injury-in-fact for Article III standing” “conflates statutory standing with constitutional standing”); *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (breaches of statutory duty do not “in and of themselves constitute[ ] an injury-in-fact sufficient for constitutional standing”)

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efficiency and worldwide reach of amici’s operations that enable them to deliver such enormous value at such low (sometimes no) cost to their users. At the same time, however, amici’s huge volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous putative classes. Any process or practice that applies to a particular user of services or websites provided by any one of the amici may well be alleged to apply equally or similarly to many thousands or millions of other users.

With increasing frequency, amici and other technology companies have been named as defendants in suits brought under statutes that provide private rights of action coupled with the ability to obtain statutory damages. Among other statutes, plaintiffs have brought suit under the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510-2522,8 the Stored Communications Act (SCA), id. §§ 2701-2712,9 the Video Privacy Protection

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8 The Wiretap Act provides a private right of action for “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used” in violation of the Act, 18 U.S.C. § 2520(a), establishes “statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000,” id. § 2520(c)(2)(B), and allows plaintiffs to seek “a reasonable attorney’s fee,” id. § 2520(b)(3).

9 The SCA provides a right of action to any “subscriber, or other person aggrieved” by a “knowing or intentional” violation of the Act, 18 U.S.C. § 2707(a), statutory damages of $1,000 for each plaintiff, id. § 2707(c), and the right to recover “a reasonable attorney’s fee,” id. § 2707(b)(3).
Act (VPPA), id. § 2710,10 and the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.11 In addition, amici and other technology companies often face claims brought under similar state statutes that also provide private rights of action combined with statutory damages. Claims under these state statutes can be brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a), supplemental jurisdiction, id. § 1367, or the Class Action Fairness Act, id. § 1332(d).

Under the Ninth Circuit’s rule, plaintiffs are able to maintain these suits against amici and other technology companies despite their inability to allege any actual harm that would support standing. The suits typically are styled as putative class actions and seek millions or even billions of dollars in statutory damages based on allegations of technical or trivial statutory violations and/or novel, untested legal theories. Such suits for statutory damages are particularly attractive to the plaintiffs’ class action bar because at least some courts have concluded that the pursuit of statutory damages based solely on an alleged injury-in-law effectively bypasses the strict commonality and typicality requirements that often preclude class certification in other contexts. E.g., Ramirez v. Trans Union, LLC, 301

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10 The VPPA provides a cause of action to “[a]ny person aggrieved by any act of a person in violation of [the Act],” 18 U.S.C. § 2710(c)(1), and entitles plaintiffs to seek statutory damages of $2,500, punitive damages, reasonable attorneys’ fees, and equitable relief, id. § 2710(c)(2).

11 The TCPA provides a cause of action “based on a violation of [the Act] or the regulations prescribed under [the Act],” 47 U.S.C. § 227(b)(3)(A), and entitles plaintiffs to seek statutory damages of $500 for each violation, id. § 227(b)(3)(B). The statutory damages may be trebled for willful or knowing violations of the Act. Id. § 227(b)(3).
F.R.D. 408, 419 (N.D. Cal. 2014) (explaining in typicality analysis that “as Plaintiff is seeking statutory damages and not actual damages, whether he was actually denied credit or received inferior credit terms … is not at issue”); Cobb v. Monarch Fin. Corp., 913 F. Supp. 1164, 1172 (N.D. Ill. 1995) (“[Plaintiff] … seeks to recover statutory damages, a claim typical to the class.”). The Ninth Circuit’s failure to require an actual injury thus threatens to undermine the “stringent requirements for [class] certification that … exclude most claims.” American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013); see also Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (explaining that class actions are an “exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only”). Where the only injury alleged is an injury-in-law, the requirement of a common injury may no longer serve the intended gating function to limit the availability of the class action mechanism.

District courts in the Ninth Circuit now presume it to be settled law “that alleged colorable violations of the Wiretap Act and the SCA alone suffice … to establish Article III standing without any independent showing of injury.” Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190, 1208 (N.D. Cal. 2014) (emphases added). In one suit, plaintiffs alleged that a software bug inadvertently resulted in the transmittal by a Facebook user’s browser of “referrer headers” to advertisers that sometimes may have included a user’s Facebook identification number or name when the user clicked on an advertisement on Facebook’s website. In re Facebook Privacy Litig., 791 F. Supp. 2d 705, 708-709 (N.D. Cal. 2011), aff’d, 750 F.3d 1098 (9th Cir. 2014). There was no allegation that any advertiser had ever actually received, much less used, the referrer header information
in any way, or that any user was actually harmed by
the alleged disclosure. Nonetheless, the district court
denied a motion to dismiss a complaint alleging viola-
tions of the Wiretap Act and seeking statutory damag-
es, despite the plaintiffs’ failure to allege any actual
harm, because “Plaintiffs allege a violation of their
statutory rights,” which the court found “sufficient to
establish that they have suffered the injury required
for standing under Article III.” *Id.* at 712.

Similarly, another suit claimed that amicus Google
violated the SCA when it allegedly included user
search queries in the URLs of Google search results
pages, URLs that could in turn be transmitted (via
“referrer headers”) to a third-party landing site if and
when the user clicked on a search result. *Gaos v.
Google Inc.*, 2012 WL 1094646, at *1 (N.D. Cal. Mar. 29,
2012). According to the complaint, the “[s]earch terms
could be linked together with the identity of the user,”
though there was no allegation that this had actually
occurred. *Id.* (emphasis added). The district court de-
nied Google’s motion to dismiss the putative class com-
plaint seeking statutory damages because “a plaintiff
may be able to establish constitutional injury in fact by
pleading a violation of a right conferred by statute” and
“the SCA provides a right to judicial relief based only
on a violation of the statute without additional injury.”
*Id.* at *3; see also *In re iPhone Appl. Litig.*, 844 F.
Supp. 2d 1040, 1055 (N.D. Cal. 2012) (“Plaintiffs have
alleged a violation of their statutory rights under the
Wiretap Act … as well as the [SCA] …. Thus, the
Court finds that Plaintiffs have established injury in
fact for the purposes of Article III standing.”).

Other district courts have extended this misinter-
pretation of Article III to cases involving the TCPA
and VPPA. Thus, a district court sustained a putative
class action brought under the TCPA where the defendant was alleged to have sent unauthorized text messages because merely “by alleging he received a text message in violation of the TCPA, [plaintiff] has established a particularized injury in satisfaction of Article III” even in the absence of an actual alleged injury-in-fact. *Smith v. Microsoft Corp.*, 2012 WL 2975712, at *6 (S.D. Cal. July 20, 2012).

Another district court sustained a putative class complaint under the VPPA despite the lack of any alleged actual injury. In that case, the plaintiffs alleged that Hulu, which provides online access to television shows, films, and other video content, had “wrongfully disclosed” anonymized information about users’ viewing histories to a metrics company that Hulu had hired to analyze its audience and to Facebook, and that the metrics company and Facebook somehow might link this information to users’ identity. *See In re Hulu Privacy Litig.*, 2014 WL 1724344, at *1-5 (N.D. Cal. Apr. 28, 2014). The court concluded that the case could proceed because plaintiffs need not “show actual injury that is separate from a statutory violation to recover … liquidated [statutory] damages.” *In re Hulu Privacy Litig.*, 2013 WL 6773794, at *4 (N.D. Cal. Dec. 20, 2013); *see also In re Hulu Privacy Litig.*, 2012 WL 2119193, at *8 (N.D. Cal. June 11, 2012) (“Plaintiffs establish an injury (and standing) by alleging a violation of a statute.”).

District courts have also applied the Ninth Circuit’s rule to allow cases alleging bare violations of state law to proceed. Thus a plaintiff has been found to have standing for a putative class claim alleging an injury-in-law under the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.*, which provides for statutory damages of $1,000 per violation and punitive damages for willful violations. *C.M.D. v. Facebook, Inc.*, 2014
WL 1266291, at *2-3 (N.D. Cal. Mar. 26, 2014). A plaintiff has been found to have standing based on the bare allegation that the defendant violated Michigan’s Video Rental Privacy Act, Mich. Comp. Laws § 445.1712, which provides a private right of action and statutory damages of $5,000 per person along with the right to recover attorneys’ fees and costs. Deacon v. Pandora Media, Inc., 901 F. Supp. 2d 1166, 1171-1172 (N.D. Cal. 2012) (alleging that public and Facebook “friends” could see a user’s music preferences). And a plaintiff has been found to have standing, based on allegations of injury-in-law alone, in a putative class action alleging violations of multiple state statutes that provide for statutory damages and injunctive relief. Goodman v. HTC Am., Inc., 2012 WL 2412070, at *8 (W.D. Wash. June 26, 2012); see also id. at *1 (alleging that transmission of location data by AccuWeather applications installed in plaintiffs’ smartphones “transform[s] the phones into surreptitious tracking devices”).

B. The Ability To Seek Class-Wide Statutory Damages For Mere Injuries-In-Law Allows Plaintiffs To Extract In Terrorem Settlements

Erosion of the Article III standing requirement in this context and the corresponding inability of defendants to obtain dismissal of no-injury suits for lack of standing, combined with the widespread availability of statutory damages under many of these types of statutes, has led to abusive, costly class-action litigation against technology companies in the federal courts. Since any technology company practice that applies to a single user may often be replicated with respect to thousands or millions of other users each day, the potential class size in such lawsuits is enormous. Indeed,
it is the very success of technology companies that have developed valuable and efficient services that are used and accessed every day by millions of people, often at no or little cost to the user, that makes them especially vulnerable to such opportunistic suits. Of particular concern, the combination of potentially huge classes with the prospect of even modest per-plaintiff statutory damages presents a threat of absurdly high potential damages that can force in terrorem settlements of meritless, no-injury cases unless they can be dismissed at an early stage.

As the district court below recognized, if a mere statutory violation “confer[s] Article III standing … where no injury in fact is properly pled,” then “federal courts will be inundated by web surfers’ endless complaints.” Pet. App. 23a-24a. Unfortunately, the district court’s prediction has already become reality—technology companies are routinely subjected to suits seeking billions (or even trillions) of dollars in damages for alleged statutory violations that are not alleged to have caused any actual harm to anyone. And the in terrorem effect of the damages exposure often leads to high-dollar settlements, even in the face of strong defenses.

For example, amicus Facebook settled a putative class action complaint alleging violations of a state statute in which the proposed settlement class “consist[ed] of some 150 million members” of Facebook’s social network. Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 940 (N.D. Cal. 2013). The complaint alleged that Facebook misappropriated users’ names and likenesses in alleged advertisements displayed to their friends on Facebook (the same friends with whom these users had chosen already to share the same information). Id. at 942. The district court explained that “[w]hile plaintiffs

Handout 3 - Spokeo Technology Amici
pleaded a sufficient basis for injury to support constitutional standing, it [was] far from clear that they could ever have shown they were actually harmed in any meaningful way.” *Id.* The district court also noted “the theoretical availability of statutory damages of $750 per violation” under state law, yielding exposure to potential statutory damages that would “threaten Facebook’s existence.” *Id.* at 944 & n.4. The court approved a $20 million settlement, of which the plaintiffs’ attorneys would receive 25 percent after payment of administration expenses, costs, and incentive awards of $1,500 to each named plaintiff. *Fraley v. Facebook, Inc.*, 2013 WL 4516806, at *1-4 (N.D. Cal. Aug. 26, 2013).

Similarly, amicus Netflix recently entered into a settlement with a class estimated to exceed 60 million individuals in a lawsuit alleging that it had unlawfully disclosed personal information to analytics companies hired by Netflix and impermissibly retained viewing information in violation of the VPPA. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4-5 (N.D. Cal. Mar. 18, 2013). There was no allegation of actual harm, and the plaintiffs themselves estimated that their “unlawful disclosure’ claim would have a 5% chance of success on the merits.” *Id.* The district court noted that Netflix had “potentially potent defenses” on all claims and might receive a “dismissal upon a dispositive motion.” *Id.* at *5. But the potential statutory damages exceeded $150 billion and the case was settled for $9 million, of which $2.25 million went to class counsel and $30,000 went to the named plaintiffs. No other class members received any monetary compensation. *Id* at *1-2.

Likewise, amicus Google recently entered into a settlement of claims brought under the SCA on behalf
of a class estimated to “comprise[] … approximately 129 million individuals.” In re Google Referrer Header Privacy Litig., 2015 WL 1520475, at *2 (N.D. Cal. Mar. 31, 2015); see also supra p.17 (describing facts of same case, which was captioned Gaos v. Google Inc. before consolidation). The court had previously noted that “the full amount of statutory damages … is likely in the trillions of dollars considering the size of the class.” In re Google Referrer Header Privacy Litig., 2014 WL 1266091, at *5 n.4 (N.D. Cal. Mar. 26, 2014) (emphasis added). The case was settled for $8.5 million, despite the plaintiffs’ concession that “the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in the circuit,” and the district court’s conclusion that “there was no guarantee that any claims would survive pre-trial challenges.” In re Google, 2015 WL 1520475, at *5. The plaintiffs’ attorneys received $2.125 million, an estimated $1 million will go to administrative costs, the representative plaintiffs will each receive $5,000, and the balance of the fund will go to various cy pres recipients. None of the other class members received any monetary compensation. Id. at *4.

Amicus Facebook settled another putative class action alleging violations of the VPPA and Wiretap Act in which the class was estimated to exceed 3.6 million people, none of whom alleged any actual injury. Lane v. Facebook, Inc., 2010 WL 9013059, at *2 (N.D. Cal. Mar. 17, 2010). The district court acknowledged that “Plaintiffs’ claims raise novel legal theories” and that the case’s “outcome … would have been uncertain.” Id. at *4. However, the plaintiffs sought $2,500 per alleged violation of the VPPA and $10,000 per alleged violation of the Wiretap Act, putting the defendants’ potential liability exposure in the billions of dollars. Id. at *2.
The court approved a $9.5 million settlement, of which $3 million went to plaintiffs’ attorneys’ fees, administrative costs, and incentive payments to class representatives. *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

Finally, amicus Google recently settled a putative class action brought under the TCPA, in which the class was estimated to include the holders of more than 185,000 unique telephone numbers, making the potential statutory damages exposure at least $200 million. Final Judgment Order 4-5, Dkt. 107, *Pimental v. Google Inc.*, No. 11-cv-2585 (N.D. Cal. June 26, 2013). The only “injury” alleged in the suit was receipt of a text message, and Google noted that all recipients were either members of the challenged text-messaging service that facilitated the text or had provided their phone number to the member who sent the text. *Pimental v. Google, Inc.*, 2012 WL 1458179, at *1 (N.D. Cal. Apr. 26, 2012). The parties settled for $6 million, of which $1.5 million went to attorneys’ fees, $5,000 went to the named plaintiffs, and the balance went into a settlement fund that would be disbursed to *cy pres* recipients if funds went unclaimed. *Pimental*, Final Judgment Order 4-5, 7.

These examples offer a disturbing commentary on the consequences of the Ninth Circuit’s no-injury standing jurisprudence and the readiness of the class-action plaintiffs’ bar to exploit it with opportunitistic lawsuits. Plaintiffs’ ability to file these types of cases based on alleged injuries-in-law without identifying any one who has suffered any actual harm has an extreme and chilling effect on technology companies including amici. Perversely, the primary consequences of the expensive litigation and resulting *in terrorem* settlements of these no-injury controversies are the diversion of re-
sources away from technology companies’ efforts to develop and provide increasingly innovative services and products to the users who often comprise the putative classes in these cases. Thus, at least in the Internet-based technology sector represented by amici, the ultimate losers under the Ninth Circuit’s standing ruling may be members of the vast consuming public, who now or in the future may face limited or more costly access to these highly beneficial services and products that they now often receive for free or at very low cost.

III. THE EXECUTIVE BRANCH CAN AND DOES ACT ON BARE STATUTORY VIOLATIONS AND PRIVATE LITIGANTS MAY VINDICATE LEGAL RIGHTS WHERE ACTUAL HARM OCCURS

There is no need for private federal lawsuits, brought by litigants who allege no actual injury, to ensure that these statutes are given their full force and effect. Executive officials routinely exercise their considerable authority to enforce statutes like the FCRA, the Wiretap Act, the SCA, and the TCPA. Accordingly, the Executive Branch can be reasonably expected to scrutinize business activity for compliance with the obligations imposed by these statutes.

The agencies charged with enforcing the FCRA regularly enforce its provisions against a variety of different companies. E.g., Order, Dkt. 5, United States v. Instant Checkmate, Inc., No. 14-cv-675 (S.D. Cal. Apr. 1, 2014) (consent agreement with FTC imposing $525,000 fine and injunctive relief for FCRA violations); Stipulated Final J., Dkt. 3, United States v. Infotrack Info. Servs., Inc., No. 14-cv-2054 (N.D. Ill. Mar. 25, 2014) (consent agreement with FTC imposing $1 million fine and injunctive relief for FCRA violations); Order, In re DriveTime Automotive Group, Inc., No. 2014-17
The FTC has recently entered into consent agreements with various technology companies alleged to have committed privacy violations. *E.g.*, Order, *In re Snapchat, Inc.*, No. 132-3078 (FTC May 8, 2014) (proposed consent agreement regarding alleged privacy violations by Snapchat application); Order, *In re Goldenshores Techs., LLC*, No. 132-3087 (FTC Dec. 5, 2013) (consent agreement regarding alleged privacy violations by creator of popular flashlight smartphone application); Consent Decree, Dkt. 8, *United States v. Path, Inc.*, 13-cv-448 (N.D. Cal. Feb. 8, 2013) (consent agreement regarding alleged privacy violations by a social networking application). In total, the FTC has brought more than 170 enforcement actions related to privacy since 1997, including 60 separate actions from 2012-2014. Solove & Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 600 (2014); FTC, *Legal Resources*, available at https://www.ftc.gov/tips-advice/business-center/legal-resources (search “TYPE=Case” and “TOPIC=Privacy and Security” for each year) (last visited July 8, 2015). In light of the significant influence the FTC exerts in privacy regulation, scholars have concluded that “the FTC has become the dominant enforcer of privacy” rights in America. Solove & Hartzog, 114 Colum. L. Rev. at 602.

(proposing $2.9 million fine for TCPA violations); Forfeiture Order, In re Presidential Who’s Who, Inc., No. 12-217 (FCC Mar. 28, 2014) (proposing $640,000 fine for TCPA violations).

While executive enforcement of these and similar statutes is robust, it bears noting that private litigants who are actually injured are also entitled to bring claims under these statutes. Moreover, these statutes provide individual litigants with numerous tools to ensure that they are incentivized and able to vindicate their statutory rights. The Wiretap Act, SCA, VPPA, and TCPA all provide for injunctive relief. 18 U.S.C. § 2520(b)(1); id. § 2707(b)(1); id. § 2710(c)(2)(D); 47 U.S.C. § 227(b)(3)(A). The VPPA and TCPA provide for enhanced damages. 18 U.S.C. § 2710(c)(2)(B); 47 U.S.C. § 227(b)(3). And the Wiretap Act, SCA, and VPPA provide for attorneys’ fees. 18 U.S.C. § 2520(b)(3); id. § 2707(b)(3); id. § 2710(c)(2)(C). This Court has long recognized that the availability of attorneys’ fees alone provides a strong incentive for litigants to pursue important public interest litigation. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (“Congress … enacted the provision for counsel fees … to encourage individuals injured by racial discrimination to seek judicial relief under Title II.” (emphasis added)); see also Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114, 118 (5th Cir. 1975) (recognizing the incentive to bring individual claims when “each claimant is provided with reasonable attorney’s fees and costs”); Rowden v. Pacific Parking Sys., Inc., 282 F.R.D. 581, 586 (C.D. Cal. 2012) (recognizing that the availability of attorneys’ fees and punitive damages “give individuals truly harmed by a [statutory] violation a more than sufficient incentive to bring an action even if the amount of recovery is difficult to quantify or relatively small”);
Kline v. Security Guards, Inc., 196 F.R.D. 261, 274 (E.D. Pa. 2000) ("[T]he very purpose of a fee-shifting statute such as the one at issue here is to provide incentive to counsel to pursue otherwise unprofitable litigation."). Accordingly, fidelity to Article III’s injury-infact requirement will still leave private litigants harmed by statutory violations with strong incentives and numerous remedies to enforce their rights when violations cause real harm and the federal judicial power may be properly invoked.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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Advertising Pitfalls and Best Practices to Respond to False Advertising Challenges

BY JASON S. HOWELL, JEANNE M. CULLEN AND JOREN S. AYALA-BASS

Advertising should command consumers’ interest and improve sales, rather than draw costly legal challenges that can deplete a brand’s resources and tarnish its reputation. For this reason, brands and their legal teams should carefully review and manage advertising to reduce the likelihood of scrutiny by state and federal regulators, plaintiffs’ attorneys and competitors. Of course, aggressive ad campaigns that may trigger a challenge sometimes make sense for a brand, such as comparative campaigns against competing products or services. Campaigns for cutting-edge products or services may advertise novel capabilities or characteristics, while other campaigns may market products and services that tend to draw more legal attention, such as health, weight-loss, eco-friendly, financial and child-related products and services. For comparative, cutting-edge and other higher-risk campaigns, advertisers should shore up their defenses against, and develop an action plan for, potential challenges.

This article introduces the Federal Trade Commission’s Operation Full Disclosure, provides case studies that illustrate some of the pitfalls facing digital and traditional advertising and proposes some practical, preventive steps for reducing the likelihood of a false advertising challenge and some defensive steps for responding to a regulator or other challenge on false advertising grounds. In addition, the case studies below, including the FTC settlements with Sony Computer Entertainment America LLC and Deutsch LA Inc., provide a reminder that regulators are actively scrutinizing both digital and traditional advertising, and that the same basic truth-in-advertising rules apply, regardless of whether advertising is in digital or social media, TV, print or other formats.

I. FTC’s Operation Full Disclosure

The FTC recently sent a strong “shape up” message to advertisers as part of Operation Full Disclosure. It sent letters to more than 60 advertisers, including 20 of the nation’s top 100 advertisers, warning that the brands failed to clearly and prominently disclose important information needed to prevent ads from misleading consumers. The FTC did not publicly disclose the recipients of the letters, but reported that they covered a wide range of industries, including consumer electronics, food, drugs, household items, personal care products and weight loss products. The FTC cautioned that advertisers “who did not receive a letter should not assume that their advertisements are fine.”

The insufficient disclosures targeted by the FTC fall into many categories, including ads that:

- quoted the price of a product or service, but did not adequately disclose the conditions for obtaining that price;
- failed to adequately disclose an automatic billing feature;
- did not adequately disclose the need to first buy or own another product or service to use the advertised product;
- claimed that a product was unique or superior in a category, but did not adequately disclose how narrowly the advertiser defined the category;
- compared products, but did not adequately disclose the basis for the comparison;
II. Recent False Advertising Pitfalls

Three recent cases illustrate how digital and traditional advertising can trigger unwanted legal challenges, including from state and federal regulators, when the advertising is not carefully crafted and managed. The cases provide important lessons and takeaways, including:

- Advertisers should be careful not to overpromise or oversell product characteristics and capabilities, including via product demonstrations.
- Advertising should set accurate consumer expectations—including, for example, about key terms such as billing—by using truthful advertising messaging, and, when appropriate, clear and prominent disclosures that take into account the differences in relevant media (e.g., digital, mobile, social media and traditional advertising).
- Advertisers and their ad agencies should comply with the FTC’s guidance regarding the use of testimonials and endorsements, including by ensuring that any social media endorsements clearly and prominently disclose any material connection between the advertiser or agency and the endorser.

A. FTC v. Sony Computer Entertainment

In late November, the FTC announced settlements with Sony Computer Entertainment America and its advertising agency, Deutsch LA, in connection with complaints filed against the companies related to Sony’s PlayStation Vita gaming console. Sony launched an ad campaign to promote the Vita that included Internet ads and TV commercials, which the FTC alleged falsely claimed that users could play PS3 games and the popular Killzone 3 game on the Vita in “remote play” functionality. According to the FTC, Sony and Deutsch advertised for the Vita suggested that users would “Never stop playing” and showed users enjoying the “remote play,” “cross save” and real-time 3G features. In fact, according to the FTC, users could not easily access their PS3 games or Killzone 3 on the Vita in the ways shown in Sony’s ads, rendering the ads false or misleading.

The FTC’s complaint against Deutsch focused on the agency’s assertion that, by preparing and promulgating the ads, the company knew or should have known that Sony’s statements were false or misleading when they were created. The FTC also faulted Deutsch for creating the social media hashtag “#gamechanger” and encouraging its employees to post complimentary comments about the Vita on their personal social media accounts, without disclosing their affiliation with Deutsch or Sony. As a result, the FTC alleged, Deutsch employees used their personal social media accounts to post positive comments about the PS Vita, including “One thing can be said about PlayStation Vita...it’s a #gamechanger” and “This is sick...See the new PS Vita in action. The gaming #GameChanger.” Because Deutsch represented that its employees’ comments reflected “the views of ordinary consumers who had used the PS Vita,” the FTC asserted that they “were not independent comments reflecting the views of ordinary consumers who had used the PS Vita.” Rather, according to the FTC, Deutsch’s conduct was false and misleading because social media postings were “created by employees of [Deutsch], an advertising agency hired to promote the PS Vita.”

In their settlements with the FTC, Sony and Deutsch were barred from making unsupported claims in their advertising and agreed to pay compensation to some Vita owners. Further, Deutsch was also barred from misrepresenting that an endorser of any game console product or video game product is an independent user or ordinary consumer of the product. Deutsch must disclose any material connection that it has with any endorser of a game console or video game, or with any other entity involved in the manufacture or marketing of the product.

According to Jessica Rich, director of the FTC’s Bureau of Consumer Protection, “companies need to be reminded that if they make product promises to consumers—as Sony did with the ‘game changing’ features of its PS Vita—they must deliver on those pledges...The FTC will not hesitate to act on behalf of consumers when companies or advertisers make false product claims.”

B. FTC v. AT&T Mobility LLC

In late October, the FTC brought a complaint against AT&T Mobility LLC, seeking permanent injunctive relief, rescission or reformation of consumer contracts, restitution, refund of monies paid, disgorgement, costs and other equitable relief.

The complaint alleges that AT&T violated Section 5(a) of the FTC Act in connection with the marketing of wireless broadband Internet access service for smartphones. Specifically, the FTC alleges that AT&T engaged in a “deceptive act or practice” when it represented that its customers’ data plan would be “unlim-
The FTC also alleges that AT&T engaged in an “unfair act or practice” when it entered into mobile data contracts with consumers that were advertised as providing access to “unlimited data,” for a fixed sum, but for some of its customers who used a large amount of data during a billing cycle, AT&T reduced the customer’s data speed. Both claims are based on the argument that by reducing the data speed, or “data throttling,” AT&T did not provide its customers with the “unlimited data” promised, but instead restricted data. As a result, AT&T customers who had been told they would receive “unlimited data” are not able to load Web pages, or perform functions such as listening to music, without access to faster data speeds.

The FTC alleges that AT&T made misrepresentations or deceptive omissions of material fact by not affirmatively disclosing in its contracts or ads that it may modify, diminish or impair the service of certain customers using a specified amount of data. Also, even though some of AT&T’s customers received a disclosure that AT&T may reduce speeds for the top 5 percent of users with unlimited data, other customers did not receive the notice or the disclosure failed to adequately convey how a customer’s service could be affected.

To avoid FTC or other scrutiny, disclosures should be sufficiently clear and prominent, so that consumers will notice and understand the information disclosed. Here, for example, in addition to stating that AT&T’s service could be modified, diminished or impaired for certain customers hitting a certain data usage, the disclosure could have communicated the nature and extent to which a customer’s data speed could be reduced, including the expected range in reduction and how the reduction would affect downloading or listening to music, watching videos and other use. Giving more targeted disclosures could properly align consumer expectations and help avoid a costly investigation or litigation.

C. Sirius XM Radio Inc., Assurance With the State of Ohio

It is not just the FTC that is targeting companies for false or misleading digital advertising. States enforcing their consumer protection statutes pay close attention to consumer complaints and actively change advertising. For example, in December, SiriusXM Radio Inc. entered into a settlement (the Assurance) with the state of Ohio to pay 45 states and the District of Columbia $3.8 million collectively, and to provide restitution to eligible consumers in connection with those states’ investigations and allegations that Sirius engaged in misleading advertising and billing practices. Following consumer complaints and the states’ investigations, Ohio’s attorney general alleged that Sirius engaged in misleading, unfair and deceptive acts or practices in violation of consumer protection laws when it (1) automatically renewed consumer services without consumer consent or knowledge of the automatic renewal policy; (2) automatically charged or billed consumers for the automatic renewal of consumer services without the consent or knowledge of the renewal policy; (3) failed to honor cancellations or made it difficult for consumers to cancel their services; (4) failed to provide timely refunds or refused to refund payments; and (5) misrepresented that consumer services would be canceled, would not be renewed, or would be refunded.

Among the settlement’s compliance requirements, Sirius agreed to modify its advertising disclosures. For example, Sirius must “clearly and conspicuously” disclose—and not misrepresent—any material term, condition or obligation of its subscription plans. Sirius also agreed to disclose all material terms, conditions and obligations if its subscription plans will automatically renew at the term end, including disclosing the new term and the new rate. The Assurance also requires Sirius to inform consumers that they must contact Sirius by phone to cancel. Further, if an advertisement contains a single offer that is repeated more than once, or multiple offers that contain the same material limitations, then each disclosure that Sirius must make related to the subscription plan must clearly and conspicuously identify that it applies to all offers.

The Assurance acknowledges that some disclosures required by the agreement may not be possible on all digital platforms, and provides Sirius with guidelines to follow in such circumstances. If restrictions exist—for example, on the number of characters, text size or graphics—which would make compliance with the terms of Assurance impossible, or if Sirius is placing ads in media where required disclosures cannot reasonably be clearly and conspicuously made, the agreement would not require compliance, provided that the advertisement is not otherwise misleading or deceptive. Notably, however, the FTC has stated in its “.com Disclosures” that “If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated.”

The Assurance anticipates that the other 44 participating states and the District of Columbia will enter into agreements with Sirius XM that are “substantially identical” to the Assurance with the state of Ohio, and therefore the Assurance contains a uniform definition of “clearly and conspicuously.” Although this unified definition is specific to the Assurance, it provides some guidance to companies advertising electronically on how states may interpret the mandate that required disclosures are made “clearly and conspicuously.”

Specifically, the Assurance defines “clearly and conspicuously” to mean that:

- the required disclosure is in a size, color, contrast location, duration, and audibility that makes it readily noticeable, readable, and understandable. A Clear and Conspicuous disclosure may not be contradicted by or be inconsistent with any other information with which it is presented. If any statement modifies, explains, or clarifies other information with which it is presented, it must be presented close to the information it modifies, in a manner that is readily noticeable, readable, and understandable and it must not be obscured in any manner.

The Assurance further provides detailed specifications for print advertisements, disclosures disseminated orally and those disseminated through electronic media. Regarding electronic disclosures, any audio disclosures shall be delivered in a volume and cadence for the
consumer to sufficiently comprehend. Likewise, visual disclosures should be of a size and shade and appear on the screen for a duration that is sufficient for a consumer to read and comprehend. The Assurance’s requirements emphasize that whichever media is used, mandatory disclosures must be made prominently, either visually or orally, to increase the likelihood that consumers will receive and understand them.

III. Practical Guidance

How to Reduce the Likelihood of a False Advertising Challenge

Vague, unclear, inaccurate, unsupported and deceptive online (and offline) advertising can result in challenges by state and federal regulators, plaintiff’s attorneys and competitors. Taking the following steps can go a long way to reducing the likelihood that an advertiser will receive a challenge to its advertising:

1. Review advertising guidelines, both internal materials for marketing and legal teams and external-facing materials for business partners and ad agencies. If these materials exist, they deserve a fresh review in light of recent regulator, competitor and class action challenges. If the materials do not exist, now is the time to craft them.

2. Given the dynamic nature of the law and guidance in this area, hold regular training sessions for in-house marketing and legal teams. Regular training sessions will streamline the workload for in-house and outside legal teams, and will demonstrate good housekeeping practices that could be perceived favorably if a regulator challenges or investigates a brand.

3. Analyze all advertising content to identify all express and implied claims reasonably communicated by the content, and ensure such claims are true and not misleading. Ensure qualifying information for express and implied claims is clearly and conspicuously disclosed to consumers. ‘Clear and conspicuous’ varies depending on the nature of the content and claims. For example, some information might be clear and conspicuous on a Web page but not when viewed on a mobile device.

4. Ensure express and implied advertising claims are supported by well-documented, credible evidence before the claims are published. The nature and quality of substantiation needed will vary depending on the claims, products, and services. Be prepared to provide such substantiation upon request.

5. Take extra precautions for higher-risk messaging, such as health claims, food and beverage claims, eco-friendly claims, comparative claims, price claims and claims directed to children.

How to Respond to a False Advertising Challenge

If a brand receives an advertising challenge or investigation, it can take action to best position itself for a response to potentially resolve the matter and reduce further business disruption.

If a regulator intends to challenge advertisements, it will likely first contact an advertiser in writing to request the information that it would like the advertiser to provide; the steps requested to address the identified issue; and a deadline by which to comply with the regulator’s requests. By failing to timely respond, the advertiser runs the risk of a more formal investigation or lawsuit, which would be more costly, cause business disruption and most likely lead to having the advertiser produce more information than originally requested. It therefore behooves a brand to be proactive in response to any request for information made by a regulator challenging an advertisement.

Similarly, a competitor or plaintiff’s attorney may also first contact the advertiser in writing to allege false advertising. However, instead of opening a dialogue to review the advertiser’s documents first, as more routinely followed by regulatory bodies, plaintiff’s attorneys or competitors may immediately demand compensation for alleged damages and threaten an immediate lawsuit if their demands are not met.

Whether a brand is responding to a regulator, plaintiff’s attorney or competitor advertising challenge, there are five simple steps an advertiser can take to help guide it toward an early resolution, or at least to minimize the potential exposure in litigation.

1. Determine the Form of Request the Advertiser Received. Identify the form of request received, which will dictate the advertiser’s next steps. For regulatory investigations, there are several avenues the regulator can take to obtain information, including issuing a warning letter, an access letter, a preservation request or a civil investigative demand. Each of these communications requires a customized response and has different deadlines. If a plaintiff’s attorney contacts the advertiser, he or she may also seek information, which the advertiser is usually not required to provide, but may wish to in order to resolve a dispute without a complaint being filed.

2. Preserve the Advertiser’s Information. Identify the key custodians of the information requested, and institute a legal hold on those data and other documents related to the subject matters of the request made by the agency or other requesting party. This could include conducting interviews for possible sources of information from each custodian, suspending routine deletion practices and preserving information retained by departing employees.

3. Keep the Advertiser’s Information and the Regulator’s, Plaintiff’s Attorney’s or Competitor’s Requests Confidential. During a regulator investigation, FTC inquiries, for example, are nonpublic, and warnings, access letters and civil investigative demands are not published online and are exempt from Freedom of Information Act requests. Similarly, many competitor or plaintiff’s attorney requests are not made publicly. Therefore, work to preserve the confidentiality of the requests and the advertiser’s response. Try to limit all communications about the matter internally to only those with a need to know to assist in the response, and instruct the advertiser’s teams not to discuss the matter with anyone inside or outside the company who does not have a need to know.

4. Identify a Team to Address the Issues Raised by the Regulator, Plaintiff’s Attorney or Competitor. Identify a legal and business team to respond to information requests. Within a few days of receiving a re-
quest, direct counsel to the requestor to confirm receipt and open a dialogue about the request’s scope, burden issues and response schedule. The advertiser may be able to obtain agreements to narrow the scope of the request and obtain more time to respond. Early action to make these proposals and secure agreements with the requestor is important because agency staff attorneys, for example, generally need to obtain approval internally at the agency, and well in advance of a stated deadline.

5. Determine the Advertiser’s Response Strategy. The advertiser’s legal and business teams should be familiar with the advertiser’s claims, claim substantiation, document systems and organizational structure. The first determination when deciding how to respond to a request is deciding which of the requests can be responded to in a short time frame, which are possible to respond to generally but will take more time and which requests cannot be responded to, either because the requested information does not exist, or for other reasons (e.g., laws preventing the advertiser from producing the requested information, such as the Electronic Communications Privacy Act). If, for example, the advertiser received a warning letter from a regulator that asks it to stop or revise specified advertising, a determination will have to be made about whether the advertiser has a basis to challenge the agency’s position, or whether the advertiser is willing to make the change requested.

In the event of a regulator investigation, after working with the regulator and submitting the advertiser’s final response, the agency may agree to close its investigation without taking any further action against the advertiser. If, however, the regulator determines that there is good reason to believe that the advertiser did not comply with the law, because it has determined that its advertising is false, misleading, unsubstantiated or otherwise not compliant, it may request a consent decree. This is a legally binding resolution that can last for many years, depending on the settlement, and contains requirements for the advertiser’s business practices in order to prevent the conduct from occurring again. The agency also may obtain financial redress for the allegedly injured consumers. If the advertiser decides not to agree to the resolution, the agency may file a lawsuit against the advertiser.

Likewise, in the event the advertiser and a competitor or plaintiff’s attorney cannot work out a resolution to a challenge, most likely, litigation will ensue. Litigation may take years and can be costly. Given the potential immediate harm to a competing product, competitors will request injunctive relief to end or modify the advertising campaign immediately, which will force the advertiser to litigate the matter on the merits within a very short time frame. Plaintiff’s attorneys will likely try and pursue their claims through alleged class actions, which if certified by the court, can lead to substantial damages or lengthy appeals.

IV. Conclusion

Whether a brand is advertising in traditional media, such as print or TV, or in digital or social media, the same basic rules apply: Advertisements must truthfully describe products and services so consumers understand both what they are paying for and important limits on their purchases. Ads should incorporate important limitations or make disclosures that explain material limits in a clear and prominent manner. The FTC and other challengers are actively policing digital and traditional advertising, so a careful brand will work proactively to identify problematic advertising claims and needed disclosures before receiving a challenge.

Jason Howell is a partner in the Seattle office of Perkins Coie LLP, where he co-chairs the firm’s Advertising, Marketing & Promotions group. His practice focuses on advertising, promotion, consumer protection and IP law issues, including advertising clearance, claim substantiation, marketing agreements and contests and sweepstakes. He is also a member of the firm’s Intellectual Property, Retail & Consumer Products and Interactive Entertainment groups.

Jeanne Cullen is a partner in the Commercial Litigation and Product Liability groups in the Chicago office of Perkins Coie LLP, where her practice focuses on alleged false labeling actions, alleged breach of contract and other UCC issues concerning retail and consumer products. She is also a member of the firm’s Retail & Consumer Products, Food & Beverage and Advertising, Marketing & Promotions groups.

Joren Ayala-Bass is Senior Counsel in the Commercial Litigation group in the San Francisco office of Perkins Coie LLP, where his practice focuses on defending companies against class action lawsuits brought under state and federal consumer protection, antitrust and privacy statutes. He also counsels brands on product labeling and advertising, terms of use and arbitration provisions.
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Along with the growing demand for and attention to product ingredients, many consumer product manufacturers and retailers continue to be under a growing attack from class actions and other investigations involving their product labels, advertising campaigns and websites. This is particularly true for those manufacturers and retailers in the food and beverage and supplement industries. This growing attention translates into increased scrutiny and subsequent actions for many sources, including the governments and state attorneys general, regulators from the FDA (U.S. Food & Drug Administration and FTC (Federal Trade Commission), consumer protection advocacy groups, and plaintiffs’ class action attorneys. These actions while historically predominantly filed in the state of California, have recently been much more prevalent in other states as well, including New York, New Jersey, Florida, Illinois and Missouri, among others. While the defense continues to successfully repel these claims, new targets, including supplement manufactures, find themselves a growing target by plaintiffs in many of the same attacks drawn from plaintiffs' playbooks against food and beverages manufacturers. Click here to read more.
Jeanne Cullen has dedicated her career to representing food, beverage and supplement manufacturers, distributors, retail and consumer products companies, and other clients in the areas of complex commercial litigation, product liability, business litigation, including various business torts such as alleged fraud and trade secrets, catastrophic premises and personal injury defense, as well as general dispute resolution and risk management consulting. Jeanne has represented many clients including FORTUNE 50 companies in various breach of supplier agreements, including UCC and servicing issues, contaminations, customer and retailer complaints, recalls, alleged false labeling actions and other issues. Jeanne also counsels and provides risk management legal advice to various businesses in many areas, including contractor health and safety policies as they relate to premises litigation, as well as managing third party actions against client employers for catastrophic personal injuries involving their employees, and direct personal injury premises actions by contractors or other invitees.

In addition to her deep litigation experience, Jeanne is passionate about issues on diversity and women's leadership initiatives, as well as mentoring. She currently chairs the firm's Women's Forum and formerly chaired the Chicago Diversity Committee for many years.

**REPRESENTATIVE EXPERIENCE**

**LITIGATION**

*John Wm. Macy's CheeseSticks, Inc.*

Defended John Wm. Macy's CheeseSticks in a purported class action filed in New York, where plaintiff asserted various claims on behalf of the class regarding the company's use of "All Natural" product labeling and advertising. The matter was settled on terms very favorable to the client.

*Shayaan Inc. v. Krispy Krunchy Foods, LLC*

Won dismissal of an amended complaint for breach of contract against our client Krispy Krunchy Foods in a threatened class action and demanded millions of dollars from our client, who refused to settle.

*International Beverage Manufacturer*

Successfully represented and counseled FORTUNE 50 beverage manufacturer in $27 million contract interpretation dispute saving the client millions of dollars.

*International Supplement Manufacturer*

Represent international supplement manufacturer in purported class action in California targeting the labeling "Made in USA."
**International Supplement Manufacturer**
Represent international supplement manufacturer on alleged claims involving product labeling involving “natural” line of products in California.

**Rizvi and Qadri v. Krispy Krunchy Foods, LLC**
Obtained dismissal with prejudice for alleged false labeling action involving whether chicken was Halal.

**Brown, et al. v. Miller Brewing Co., et al.**
Successfully represented FORTUNE 50 beverage manufacturer in alleged failure to warn and label action involving issues of addiction.

**Pet Food Manufacturer**
Represented and counseled pet food manufacturer in FDA recall involving alleged issues of contamination concerning listeria.

**International Medical Device Distributor**
Represented and counseled international medical device distributor in FDA product recall involving alleged defective product performance.

**International Food Manufacturer**
Successfully represented and counseled FORTUNE 50 food manufacturer in multimillion dollar breach of supplier agreement.

**International Food Manufacturer**
Counseled client through an OSHA investigation involving a fatality resulting in no citations.

U.S. District Court for the Northern District of Iowa
Successfully represented FORTUNE 50 food manufacturers in catastrophic premises action involving alleged brain and other serious personal injuries of contractor’s employees.

**PepsiCo Inc. v. H.B. Fuller Company**
Circuit Court of Illinois, Cook County
Successfully represented FORTUNE 50 beverage manufacturer in breach of supplier agreement.

**Kindred v. Norfolk Southern RR Company v. Quaker Oats**
Circuit Court of Illinois, Cook County
Successfully represented FORTUNE 50 food manufacturer in catastrophic premises action involving traumatic amputation of limb, and other alleged serious personal injuries.

**Quaker Oats v. David Michael & Company**
U.S. District Court for the Northern District of Illinois
Successfully represented FORTUNE 50 food manufacturer in breach of supplier agreement regarding non-conforming goods.

**Mockbee v. Humphrey Manlift v. Quaker Oats**
Circuit Court of Illinois, Cook County
Successfully represented FORTUNE 50 food manufacturer in premises action involving paraplegic and other injuries.

**Flavours Inc. v. Naked Juice Company, et al.**
Superior Court of California, Riverside County
Successfully represented FORTUNE 50 beverage manufacturer in various alleged business tort action. Court sustained all demurrers, and client was awarded attorneys’ fees.
Bainbridge v. Yeaman Machinery v. Golden Grain Company
Circuit Court of Illinois, Cook County
Successfully represented FORTUNE 50 food manufacturer in products liability action.

Highroad Consulting v. PepsiCo Inc.
Successfully represented FORTUNE 50 beverage manufacturer in breach of contract arbitration.

Circuit Court of Illinois, Cook County
Successfully defended City of Chicago Fire Department and 911 personnel in high profile case arising from high-rise fire resulting in six deaths and multiple serious injuries, including brain injuries, when tenants were trapped in a stairwell.

Major Tire Manufacturer
Successfully represented major tire manufacturer in many product liability lawsuits alleging serious personal injuries.

MCR v. Chicago Board of Education
Circuit Court of Illinois, Cook County
Successfully represented MCR in breach of service contract matter.

Schulson v. D’Ancona & Pflaum LLC
Circuit Court of Illinois, Cook County
Successfully represented law firm in alleged legal malpractice action where Appellate Court upheld dismissal of client.

Walid Elkhatib v. Dunkin’ Donuts
U.S. District Court for the Northern District of Illinois
Successfully represented food retailer in discrimination and breach of contract matter.

Roche v. Sears and Huffy Bicycle Company
Circuit Court of Illinois, Cook County
Successfully represented bicycle manufacturer in products liability matter.

Melendez v. Arnold Machinery and NACCO
Successfully represented forklift manufacturer in products liability matter.

Rodriguez v. NACCO Materials Handling Group Inc.
Successfully represented forklift manufacturer in products liability matter.

Roadmaster Corporation v. General Electric Company*
U.S. District Court for the Northern District of Illinois
Successfully represented treadmill manufacturer in products liability matter, leading to multimillion dollar settlement.

Robinson v. Northrop Grumman*
U.S. District Court for the Northern District of Illinois
Successfully represented government contractor in False Claims Act matter.

TSC v. Northrop Grumman*
Circuit Court of Illinois, Cook County
Successfully represented government contractor in breach of contract matter.

* Prior Experience
BAR ADMISSIONS
• Illinois

COURT ADMISSIONS
• U.S. Court of Appeals for the Seventh Circuit
• U.S. District Court for the Northern District of Illinois - Trial Bar
• U.S. District Court for the Southern District of Illinois
• U.S. District Court for the Eastern District of Wisconsin

EDUCATION
• Chicago-Kent College of Law, Illinois Institute of Technology, J.D., 1997
• Loyola University Chicago, M.B.A., cum laude, 1993
• Loyola University Chicago, B.B.A., cum laude, 1992

PROFESSIONAL LEADERSHIP
• Women's Forum, Chair
• Chicago Diversity Committee, Chair, 2005 - 2009
• Women's Leadership Committee, Chair, 2008 - 2012
• Women's Bar Association of Illinois, Member of Civil Litigation Committee
• American Bar Association, Member of Alternative Dispute Resolution; Class Actions and Derivative Suits; Pretrial and Discovery; Technology for the Litigator; Trial Evidence; Trial Practice; Antitrust Litigation; Business Torts Litigation; Commercial and Business Litigation; Products Liability; Professional Liability Litigation; Corporate Counsel; Ethics and Professionalism; and The Women Advocate committees.
• Chicago Bar Association, Member
  • Alliance for Women, Civil Practice, Tort Litigation, Commercial Litigation, and Federal Civil Practice Committees, Member
• Defense Research Institute
• Selected and attended Kellogg School of Management Strategic Leadership program, 2012

RELATED EMPLOYMENT
• Cahill, Christian & Kunkle, Chicago, Associate, 1999 - 2002
• Wildman, Harold, Allen & Dixon, Chicago, Associate, 1997 - 1999

SELECTED PUBLICATIONS

04.08.2016
US halal food Regulations . . . Are you up to speed?
Articles
Food Navigator-USA.com

The most recent US Religion Census (2010) shows that Islam was the fastest growing religion in America from 2000 to 2010, and that there were 20.6 million Muslims living in the US in 2010, up from 1 million in 2000-a 160% increase.
**10.2015**  
*Part 2: Avoiding Litigation*  
*Articles*  
*Nutrition Industry Executive*  
Along with the growing demand for and attention to product ingredients, many consumer product manufacturers and retailers continue to be under a growing attack from class actions and other investigations involving their product labels, advertising campaigns and websites.

**09.2015**  
*Part 1: Overview; Labeling, Claims and Class Actions Lawsuits*  
*Articles*  
*Nutrition Industry Executive*  
More than ever before, American consumers are growing interested in and paying attention to their health, fitness and nutrition.

**08.24.2015**  
*Women in Law: Creating a Culture of Diversity*  
*Articles*  
*NWSidebar*  
Businesses are recognizing and valuing diversity in the workforce more than ever before, and this is equally true in the legal profession.

**12.23.2014**  
*Advertising Pitfalls and Best Practices to Respond to False Advertising Challenges*  
*Articles*  
*Bloomberg BNA*  
Advertising should command consumers' interest and improve sales, rather than draw costly legal challenges that can deplete a brand’s resources and tarnish its reputation. For this reason, brands and their legal teams should carefully review and manage advertising to reduce the likelihood of scrutiny by state and federal regulators, plaintiffs’ attorneys and competitors.

**PRESENTATIONS**

**05.12.2015**  
*Consumer Protection Update-Federal Trade Commission and National Advertising Division Developments*  
*Speaking Engagements*  
American Bar Association (ABA) Committee on Consumer Protection

**04.21.2015**  
*Women in Law: Navigating the Politics of Success*  
*Speaking Engagements*  
Panel Presentation / Washington, D.C.
04.16.2015

Women in Law: Being Successful and Making an Impact

Speaking Engagements
Panel Presentation / Chicago, IL
More than ever before, American consumers are growing interested in and paying attention to their health, fitness and nutrition. The 2014 Food & Health Survey: Consumer Attitudes Toward Food Safety, Nutrition & Health, commissioned by the International Food Information Council Foundation, found that 71 percent of consumers are evaluating their food choices from a healthfulness perspective, up from 61 percent in 2012. The availability and demand for locally produced and organic sources is unprecedented in recent years. With a rising uptick in consumer demand for these sources, the food and beverage industry has responded by providing more, different and healthier product options for consumers to make individualized choices. Product manufactures have also provided more information on both their product labels and websites to aid consumers with their choices. To continue reading, click here.

CONTACTS

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Sarah Crooks, a partner in the firm’s Commercial Litigation group, focuses her practice on navigating clients through complex business litigation, class action lawsuits and attorney general investigations across a variety of industry sectors, including the telecommunications, food and restaurant, childcare and education and real estate sectors. Sarah also has extensive experience representing clients in the areas of consumer protection, securities litigation, fraudulent transfer litigation and will contests.

Sarah dedicates a significant portion of her time to pro bono work and volunteer efforts to serve the legal community. Since 2002, Sarah has served as a volunteer attorney for Legal Aid Services of Oregon representing victims of domestic violence in obtaining restraining orders. Sarah is also involved with the American Bar Association, the Multnomah Bar Association (past President), and Oregon Women Lawyers (past President). In 2012, the Oregon Bench & Bar Commission on Professionalism recognized Sarah with the Justice Edwin J. Peterson Professionalism Award for consistently demonstrating the highest standards of conduct to the bench, bar and public. In 2010, Sarah was recognized for her unrelenting commitment to the promotion of women in the legal profession as a recipient of the Oregon Women Lawyers Justice Betty Roberts Award.

REPRESENTATIVE EXPERIENCE

LITIGATION

_Dex Media Inc. v. Deibert, et al._
Circuit Court of Oregon, Multnomah County
Successful prosecution at trial for Dex of $2 million fraudulent transfer and shareholder liability claims.

_DEX Media Inc. v. National Management Services Inc._
Circuit Court of Oregon, Multnomah County
Oregon Court of Appeals
Successful enforcement of contractual arbitration clause. 150 P.3d 1093 (Or. Ct. App. 2007)

_Harp v. Qwest Communications International Inc._
Circuit Court of Oregon, Multnomah County
Served as defense counsel in an Oregon state consumer protection class action where plaintiffs alleged several claims for breach of contract, fraud, and violations of the Oregon unlawful trade practices act based on billing practices. Plaintiffs sought a class-wide settlement in excess of $20 million. Perkins Coie successfully narrowed the claims certified for class treatment, negotiated a very favorable claims-made class settlement, and successfully defended the settlement agreement through a
contested fairness hearing. The class action settlement was approved by trial court following contested fairness hearing and administration of claims-made settlement is complete. Docket number: 0110-10986

**Hormel Investments v. Pine Street Investors, et al.**
Circuit Court of Oregon, Multnomah County
Trial counsel for plaintiff in takeover of real estate venture.

**Indoor Billboard / Washington Inc. v. Integra Telecom of Washington Inc.**
King County Superior Court (Washington)
Washington State Supreme Court
Reversal of summary judgment in Washington Consumer Protection Act (CPA) class action, establishing rule that causation element of CPA claim requires proof that defendant's acts were proximate cause of plaintiff's injury. 170 P.3d 10 (Wash. 2007)

**Multi-state Consumer Protection Investigation**
Successful settlement of 34 state Attorneys General consumer protection investigation.

**National Management Services Inc. v. Qwest Dex Inc.**
U.S. District Court for the District of Oregon
U.S. Court of Appeals for the Ninth Circuit
Affirmance of trial court's denial of prejudgment interest in breach of contract lawsuit. 219 F. App'x. 658 (9th Cir. 2007)

**Snyder v. SpringWater Acquisitions LLC**
Circuit Court of Oregon, Multnomah County
Trial counsel for plaintiff in securities fraud litigation.

**In re Estate of M. Bauman**
Circuit Court of Oregon, Multnomah County
Trial counsel for contestants in will contest.

**BAR ADMISSIONS**
• Oregon
• Washington

**COURT ADMISSIONS**
• U.S. Supreme Court
• U.S. Court of Appeals for the Ninth Circuit
• U.S. District Court for the District of Oregon
• U.S. District Court for the Western District of Washington

**EDUCATION**
• University of Oregon School of Law, J.D., 1996, Articles Editor, Oregon Law Review
• University of Nevada, Las Vegas, B.S., Economics, 1992

**PROFESSIONAL RECOGNITION**
• Listed in Benchmark Litigation’s Guide to America’s Leading Litigation Firms and Attorneys as a Future Litigation Star, 2011 - present
• Listed in The Best Lawyers in America 2011 - Present: Commercial Litigation; Employee Benefits (ERISA) Law; Litigation - Antitrust
• Listed in Portland Business Journal "Forty under 40," 2008
• Justice Edwin J. Peterson Professionalism Award, presented by the Oregon Bench & Bar Commission on Professionalism, 2012
• Recipient of Perkins Coie Pro Bono Leadership Award, 2011
• Justice Betty Roberts Award, presented by Oregon Women Lawyers, 2010
• Recipient of Perkins Coie Austin Crowe Mentor Excellence Award, 2010
• Portland Business Journal, Orchid Award recipient, 2009
• Michael E. Haglund Pro Bono Award, presented by Multnomah Bar Association, Legal Aid Services of Oregon and Oregon Law Center, 2006

PROFESSIONAL LEADERSHIP
• Multnomah Bar Association, Board Member and executive committee, 2007 - 2012; President, 2010 - 2011; CLE Committee, 2004 - 2007, Chair, 2006 - 2007
• National Conference of Women's Bar Associations, Board Member, 2004 - 2011, President, 2009 - 2010
• American Bar Association Tort Trial and Insurance Practice (TIPS) Section, Technology Committee, Chair, 2009 - 2010; Member, 2006 - present; Self-Insured Risk Managers Committee, Vice Chair, 2007 - 2011
• Oregon Women Lawyers, Board of Directors, 1998 - 2004, President, 2003 - 2004
• American Bar Association Tort Trial Insurance Practice (TIPS) Section, Leadership Academy, 2007 - 2008
• Owen M. Panner American Inn of Court, Barrister, Program Chair, Executive Committee member, 1999 - 2010
• Oregon State Bar Diversity Section, Executive Committee, Treasurer, 2002
• Portland Business Alliance, Leadership Portland program, 2008 - 2009
• American Bar Association, Litigation Section, Member
• Federal Bar Association, Member
• Oregon State Bar Business Litigation Section, Member

COMMUNITY INVOLVEMENT
• Campaign for Equal Justice, Board Member, Vice President, 2008 - present
• Legal Aid Services of Oregon, Domestic Violence Project, Volunteer Attorney, 2002 - present
• Hands on Greater Portland, Volunteer, 2003 - 2007
• Classroom Law Project, Coach and Judge, Mock Trial, 2004, 2006 - 2007, 2009 - present
• St. Andrew Legal Clinic, Volunteer, Walk for Justice, 2006 - 2007
• Oregon Girls State Mock Trial Instructor, 2008 - 2010

RELATED EMPLOYMENT
• Oregon Legal Services Corp., McMinnville, OR, Staff Attorney, 1997

CLERKSHIPS
• Hon. Owen M. Panner, U.S. District Court for the District of Oregon, 1999 - 2001
• Hon. Susan M. Leeson, Supreme Court of Oregon, 1998 - 1999
• Hon. Susan M. Leeson, Court of Appeals of Oregon, 1997 - 1998
SELECTED PUBLICATIONS

03.28.2016
*Implications of Supreme Court’s Approval of Statistical Study Use in Wage-and-Hour Class Actions*

Updates

The Supreme Court issued its decision in *Tyson Foods, Inc. v. Bouaphakeo* on March 22, 2016. The Court held that a group of employees in a class action could use a statistical study to establish the employer’s liability for unpaid overtime. The employees claimed that they should have been paid for time spent donning and doffing protective gear.

02.05.2016
*Supreme Court Leaves Door Open to Class Action Settlement Offer Pick-Off Defense*

Updates

Recently, the U.S. Supreme Court held in *Campbell-Ewald Co. v. Gomez*, 577 U.S. --- (2016), that a lawsuit is not moot after a plaintiff declines to accept an offer of judgment made by the defendant pursuant to Federal Rule of Civil Procedure 68.

04.18.2013
*Supreme Court Rules FLSA Collective Action Is Moot When the Individual Plaintiff’s Claims Are Resolved Before Certification*

Updates

On April 16, 2013, the U.S. Supreme Court concluded, in a 5-4 decision, that when the individual plaintiff in a "collective action" under the Fair Labor Standards Act (FLSA) resolves her own claims before certification, the case is moot and must be dismissed. *Genesis Healthcare Corp v. Symczyk*, No. 11-1059 (U.S. 2013).

03.21.2013
*U.S. Supreme Court Rejects Attempt to Manipulate Federal Jurisdictional Threshold Under Class Action Fairness Act*

Updates

The U.S. Supreme Court unanimously ruled in *Standard Fire Insurance Co. v. Knowles*, 568 U.S. __, No. 11-1450, 2013 WL 1104735 (Mar. 19, 2013), that plaintiffs attempting to bring a class action lawsuit cannot escape federal jurisdiction by agreeing to seek less than $5 million in damages.

Fall 2012
*From Business Initiative to Regulatory Imperative: What the New Era of Corporate Social Responsibility Means for Oregon Businesses*

Articles

_Oregon State Bar Litigation Journal_

Volume 31, Number 3
Expansive New Washington State Law Threatening On-line Service Providers With Criminal Liability Enacted, Now Enjoined

Updates

Earlier this year, Washington state legislators unanimously passed the nation's first criminal law requiring age verification for commercial sexual services advertisements depicting minors. The landmark law's goals are laudable, but its broad reach has some on-line service providers and traditional publishers concerned. For example, on-line service providers that allow users to post content and images on their sites, including on social networking sites, dating sites, discussion forums, blogs and chat rooms, could now face criminal exposure, even if they have absolutely no interest in placing, or permitting the placement of, such ads.
GENERATIONS AT WORK: MANAGING THE CLASH

Presented by: Joel S. Aziere, Suzanne M. Glisch, and Michael Moore

May 19, 2016
Generations at Work:
Managing the Clash

Presented by:
Joel S. Aziere
Suzanne M. Glisch
Michael Moore

Go Beyond the Cover

Tattoos
The Next Generation

- Today's generation of young people are clearly “less career ambitious” than its elders.
- Citing data from MonitoringTheFuture.org, the report shows that today’s high schoolers expect their lives to revolve less around work and more around vacation time than Gen-Xers — the generation born between the early 1960’s and 1980’s.
- Millennials also spend more of their leisure time on online activities like video games, social networking and watching TV online than their parents and grandparents, despite having similar internet access.
- Some other findings from the report: young people today make less money relative to the rest of the population than ever before, are more conscious of the value of the products they buy and are more likely to be living with their parents.
Attitudes about work and Leisure

“Millennials,” a wistful F. Scott Fitzgerald might have written today, “are different than you and me.” Managers accustomed to using certain practices to engage boomers are going to have to change their ways - and practices - if they hope to engage and retain the newest heavily scrutinized employee cohort, the millennials. This author recently completed an important study and he offers valuable advice that managers can use to make millennials feel wanted and respected.


Millennials by the Numbers

2013 Study by Millennial Branding, Boston, MA

- According to the study, both managers and Gen Y's are on the same page when it comes to workplace success.
- However, while Gen Y workers have a positive view of their managers, believing that their managers can offer experience (59%), wisdom (41%), and a willingness to mentor (33%), managers have an overall negative view of their Gen Y employees.
- They feel said employees have unrealistic compensation expectations (51%), a poor work ethic (47%), and are easily distracted (46%).
Highlights from the 2013 Millennial Report

1. **The skills managers look for when promoting Gen Y.**
   Managers and Gen Y’s both agree that soft skills are the most important, followed by hard skills and then digital/tech savvy skills (social media). 61% of managers and 65% of Gen Y’s believe that soft skills are the most important. Both managers and Gen Y’s agree that being a subject matter expert is important to career advancement. 65% of managers and 66% of Gen Y’s say it’s either important or very important. The top three most important skills that managers are looking for when promoting millennials is the ability to prioritize work (87%), a positive attitude (86%) and teamwork skills (86%).

2. **Managers are supportive of Gen Y’s entrepreneurial ambitions.** Managers are willing to support entrepreneurial Gen Y’s who want to chase business opportunities but fewer Gen Y’s are interested in that pursuit. 58% of managers are either very willing or extremely willing in supporting Gen Y’s while only 40% of Gen Y’s are either very interested or extremely interested in taking on new business opportunities.

3. **Managers are willing to support Gen Y’s who want to move around.** 73% of managers are very willing or extremely willing to support Gen Y’s who want to move within the corporation but fewer than half of Gen Y’s surveyed (48%) are either very interested or extremely interested in making the move.

4. **Social media’s role in and out of the workplace.** Gen Y employees feel that they should own the rights to their own social media profiles even if they use them during work hours. Fewer managers agree that their Gen Y’s should. Out of the managers, 54% said that Gen Y’s should have the rights to the profiles, yet 69% of Gen Y’s said they should have them. Only 16% of managers and 17% of Gen Y’s view using social media profiles to actively contribute to online industry conversations as either very important or extremely important.
5. **The manager and Gen Y relationship on social media.** When it comes to Facebook, only 14% of managers are either very comfortable or extremely comfortable being friends with Gen Y’s, while 24% of Gen Y’s said the same. When it comes to connecting on LinkedIn, 32% of Gen Y’s and 24% of their managers are either very comfortable or extremely comfortable. Gen Y’s (38%) are more comfortable making social media introductions than managers (19%).

6. **Gen Y’s don’t get enough feedback at work and want mentors.** Both managers (48%) and Gen Y’s (46%) give and receive annual performance reviews. 20% of managers and 19% of Gen Y’s don’t give or receive any type of formal review. 53% of Gen Y’s said that a mentoring relationship would help them become a better and more productive contributor to their company.

7. **In-person meetings and email trump technology at work.** Despite new technologies like Skype and social networks, traditional forms of communication are still the most common ways that both managers and Gen Y’s interact. 66% of managers say that in-person meetings are their preferred way of communicating with Gen Y’s, and 62% of employees feel the same way about how they communicate with their managers. The second most popular way of communicating between managers and Gen Y’s was email. 26% of managers and 25% of Gen Y’s prefer using email.
Highlights from the 2013 Millennial Report

8. It takes time to become a manager so Gen Y’s have to be patient. More managers say that it takes at least four years or more to become a manager than Gen Y’s. 75% of managers say four years or more and 66% of Gen Y’s say the same. 32% of managers say it takes eight years or more and 27% of Gen Y’s say eight years or more.

9. Advanced degrees aren’t required for advancement. 43% of managers say that an advanced degree can be an advantage but not required, while a mere 10% say it’s required, which is probably true for certain industries and/or professions. As for Gen Y’s, 60% say an advanced degree is either strongly recommended or recommended but not required. 22% of Gen Y’s think that it’s required.

What’s wrong with kids these days?!

The Introverted Exhibitionist

- These darn kids today. They don’t interact face-to-face.
- These darn kids today. They post pictures of themselves and details about themselves for everyone to see.
- Are they really that much different than “us”?
  - In the 1980’s and 1990’s, kids tied up landlines for entire evenings with people they went to school with all day.
Section 7 of the National Labor Relations Act (NLRA) provides that union and non-union employees have the right to engage in activities that are both “protected” and “concerted.”
- An activity is “protected” if it is undertaken for the purpose of collective bargaining or mutual aid or protection.
- An activity is “concerted” when an employee acts with or on the authority of other employees, and not solely by and on behalf of the employee him/herself.

Employee may also lose protection under the Act for public statements relating to an ongoing labor dispute that are so disloyal, reckless, or maliciously untrue as to constitute a disparagement or vilification of the employer’s product or reputation.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce an employee's right to engage in Section 7 activities, such as by terminating an employee because of the employee’s protected concerted activities.

"Many view social media as the new water cooler....All we’re doing is applying traditional rules to a new technology." - Mark Pearce, NLRB Chairman
Employer Policies

• The General Counsel concluded that the following employment policies violated Section 8(a)(1) of the Act:
  ▫ A policy prohibiting employees from posting pictures of themselves in any media which depict the employer in any way;
  ▫ A policy subjecting employees to discipline who, when internet blogging, chat room discussing, e-mailing, text messaging, or other forms of communicating, engage in inappropriate discussion about the company, management, and/or co-workers;
  ▫ A policy prohibiting employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity;
  ▫ A policy prohibiting any communication or post that constitutes embarrassment, harassment or defamation of the employer or any employee, officer, board member, representative, or staff member; and
  ▫ A policy prohibiting statements that lack truthfulness or that might damage the reputation or goodwill of the employer, its staff, or employees.

Options for handling the Millenials

• Feedback, feedback, feedback.
• Flexible hours.
• Remote workplaces.
• Embrace technology, but, do not let it consume you.
• Feedback, feedback, feedback.
Body Modifications: The good, the bad, and the ugly

Body Modifications by the Numbers

• Tattoos
  - 40% of people age 26-40 have tattoos.
  - 30% of people age 18-25 have tattoos.
• Piercings
  - 22% of people 26-40 have at least one piercing.
  - 30% of people 18-25 have at least one piercing.

Opinions regarding body art

• 2012 Careerbuilder survey
  - 42% of managers said their opinion of someone would be lowered by that person’s visible body art.
  - 3 out of 4 respondents believe visible tattoos and/or body piercings are unprofessional.
Tattoos as Constitutionally Protected Free Speech

- Coleman denied permit to operate tattoo parlor.
- Arizona Supreme Court held that tattoos, as well as the process and business of tattooing, is purely expressive activity entitled to First Amendment protection.
- “A tattoo involves expressive elements beyond those present in ‘pen-and-ink’ drawing, inasmuch as a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo’s relatively permanent image.”

Tattoos as Constitutionally Protected Free Speech

*Anderson v. Hermosa Beach* (9th Cir. 2010)
- Anderson wanted to move to Hermosa Beach, but, city ordinance banned tattoo parlors.
- 9th Circuit: Tattoos and the business of tattooing is protected by the First Amendment as “purely expressive activity.”
- “A form of speech does not lose First Amendment protection based on the kind of surface it is applied to.”

Does the First Amendment protection bar you from restriction

- **NO!**
  - A company has every right to discriminate against “optional” appearance-related traits like unusual hair styles, piercings, and tattoos.
  - Companies can limit employee’s personal expression on the job as long as they do no impinge on their civil liberties.
  - EEOC: Employers are allowed to impose dress codes and appearance policies as long as they do not discriminate or hinder a person’s protected class.
Practice Points

• Draft a dress code.
  ▪ If you truly want to prohibit such items, create a dress code.
  ▪ Have employees read and sign.
• No value judgments.
  ▪ If you are going ban visible tattoos, ban them all, regardless of content.
• Watch out for gender discrimination.
  ▪ Men and women must be treated in the exact same manner.
  ▪ Prohibition must apply regardless of location.

Tattoos as part of religious beliefs

- Employee had wrist tattoos as part of religious observation.
- Red Robin requested he cover them.
- Employee said he could not because it would be sacrilege.
- Court determined employee had “sincere religious belief”.
- Red Robin may have to accommodate.
- Red Robin’s motion for summary judgment denied.

Piercing as part of religious beliefs

• EEOC v. PAPIN ENTERPRISES, INC., (M.D. Fla. 2009)
  - Defendant owned Subway shops for which Plaintiff worked.
  - Subway policy prohibited facial piercings.
  - Plaintiff claimed nose ring was religious symbol.
  - Subway offered to allow her to put Bandaid over nose ring.
  - Court denied summary judgment, holding jury could decide whether the nose ring was a closely held religious belief.
Limits on religious beliefs

- A tattoo is not automatically protected simply because it is a religious symbol.
- Many religions condemn tattoos as defacing the body temple.
- The tattoo must be part of the religious belief.
- The covering of the religious tattoo must be prohibited by that religion.

Some Sample Company Policies

- Betsy Johnson
  - Must wear Betsy brand and no jeans.
  - No restrictions on tattoos, piercings or hair styles.
- American Apparel
  - No shiny lip-gloss, bangs, or excessive blow drying of hair.
  - Must submit full-body photo with application.
  - No eyeliner, eye shadow, glitter, over-plucked eyebrows, dyed hair, greasy hair, gauges, and much more.

Some Sample Company Policies (cont.)

- Banana Republic
  - Will consider hiring applicants with tattoos.
  - No unnatural hair colors, piercings (other than ears), or revealing clothing.
- UBS Financial Bank
  - 43 page dress-to-impress manual.
  - No more than 7 jewels and mandatory scarves.
  - No tattoos or body piercing of any kind.
Some Sample Company Policies (cont.)

- Disney
  - Just lifted 55 year ban on beards.
  - No “cutting edge trends or extreme styles.”
  - No visible tattoos or piercings (other than ears), no unnatural hair colors, no body modifications.
- Abercrombie & Fitch
  - Minimal makeup and no jewelry.
  - No visible tattoos and piercings limited to 1 per ear.

Some Sample Company Policies (cont.)

- Formal policies prohibiting visible tattoos:
  - Geico
  - USPS
  - Starwood Hotels
  - Denny's
- Formal policies allowing visible tattoos:
  - Allstate Insurance
  - Bank of America
  - Boeing
  - Wal-Mart
  - Ford Motor Company

Lawsuits regarding Tattoos

*Benjamin Amos v. Starbucks*, E.D. Texas (2010)

- Amos hired with visible tattoos and worked for 7 years, rising to level of shift manager.
- Amos covered most of his tattoos while at work, in accordance with Starbucks policy.
- New regional manager did not like tattoos. Fired him.
- Amos sued because females with tattoos allowed to work.
- Claim: Male tattoos are “threatening and aggressive” while female tattoos are “decorative and sensual.”
Lawsuits regarding Tattoos

- Wood County (Ohio) deputy Christopher Piggott
- US Marine Corps Vet and former firefighter.
- Hired as deputy. Policy states, “Tattoos are not to be visible while wearing the summer uniform.”
- Covered tattoo with black band or long sleeve shirt.
- Terminated after he refused to have tattoo removed.
- Arguing termination improper because of First Amendment and due process issues.

Lawsuits regarding Tattoos

- Talayna Claments – Exotic dancer in Washington, D.C.
- Fired for tattoo that says “LOVE.”
  - L is a handgun.
  - O is a hand grenade.
  - V is a switchblade.
  - E is a machine gun.

Lawsuits regarding Tattoos

- Joanne Stronach, 39, mother of 3
- Tattoo: Everything happens for a reason.
- Fired from job in department store café after customers complained.
- No formal policy.
- Older patrons looked down on tattoos and complained.
Lawsuits regarding Tattoos

- Virginia Carter
- Substitute teacher at West Florida High School
- Tattoo on back. Not visible during work.
- Facebook photo showed her bare back with the tattoo.
- School: Because students knew about the photographs, the tattoo hurt Carter’s ability to be an effective teacher.

QUESTIONS?
Irresistible Force Meets Immovable Object:
Generational Conflict in the Legal Profession

by Michael Moore

“IT WAS THE BEST OF TIMES, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the spring of hope, it was the winter of despair.” So begins A Tale of Two Cities, the story of English barrister Sydney Carton, swept up in the currents of the French Revolution. Carton makes the ultimate sacrifice for his client, a French aristocrat, when he switches identities with him and loses his own head to the blade of the guillotine. Both the French and the American revolutionaries rejected traditional values based on monarchy and rule by divine right, which they replaced with values based on democracy and self-determination. The legal profession is experiencing its own version of generational conflict. Lawyers and law firms that want to continue to succeed will need to adopt new styles of communication, accommodate alternative career tracks, and expand mentor programs.

Understanding generational differences allows lawyers and law firms to tap into each generation’s strengths by adopting new styles of communication, accommodating alternative career tracks, and expanding mentor programs.

The “traditionalists” were born before 1950; some of their defining events were the Great Depression, World War II, and the Cold War. They value hard work and sacrifice for long-term loyalty. Because of current economic challenges, many have chosen not to retire but try to remain active in the workplace.

The “baby boomers” were born between 1950 and 1965, and some of their defining events were the Vietnam War, the sexual revolution, and the civil
rights movement. They value ideals and want to stay forever young but can be assertive and career-driven. Their motto was “never trust anyone over 30,” which they changed to “50 is the new 40” and have now made into “life begins after 50.”

Members of “generation X” (gen Xers) were born between 1965 and 1981. Some of their defining events were Watergate, economic recession, and widespread changes in traditional family structures, including increases in divorce and in women’s participation in the workplace. They value their own abilities and are comfortable with technology but do not trust or expect loyalty from their employers. They are the ultimate free agents, ready to create career opportunities and change jobs when it serves their personal goals.

The “millenials” were born after 1981, and some of the things defining their lives have been the Internet, 9/11, and the wars in Iraq and Afghanistan. However, they also experienced a full schedule of structured activities, “everyone wins” evaluations, and the inclusiveness of diversity. They value teamwork and intellectual challenges and are both confident and enthusiastic. No wonder. At age 24, Bill Gates, a baby boomer, had not yet launched Windows. At age 24, Marc Andreessen, a gen Xer, had created Netscape and was worth $50 million. At age 24, Mark Zuckerman, a millenial, had created Facebook and was worth $4 billion.

Understanding the Problem
An institutional client calls Senior Partner on Friday afternoon. Senior Partner has inherited the relationship, the mutual loyalty of client and firm originating when the founders were classmates in the 1920s. Client needs a memorandum of understanding by Monday for a pending acquisition. When Junior Partner gets the call to meet and discuss the details, her adrenaline begins to flow. The weekend will now be spent at the office, sifting through mountains of documents, debating strategy, drafting, and redrafting. Her family needs will be displaced, but by Monday she will be one step closer to inheriting the client herself.

When Senior Associate joins the meeting, however, his look of concern is apparent. He has to coach his son’s soccer game on Saturday and attend his mother-in-law’s birthday party on Sunday, and he promised his wife a now long-delayed romantic dinner date. He immediately begins to assess what his laptop and Blackberry can handle and what material can be safely removed to his home office. He does not think he has to be physically present to participate in discussions, and he knows that drafts can be routed electronically to everyone on the team for edits.

The youngest member of the team arrives, busily texting even as she walks in. She will be late for volleyball tonight but confirms her “posse” will wait at the bar. Tonight’s social activities will not stop her from showing up early at the office but she plans to slip out mid-morning for lattes with a friend from law school to discuss an upcoming wedding. Spending the rest of Saturday cataloging documents won’t bother her because she can still be on Facebook while listening to her iPod.

Looking around the conference room, Senior Partner realizes that if he hopes to get to his cabin up north by dark, he must get this team of diverse generations working together effectively, not only for the good of the client but to retain the talent his firm has heavily invested in.

Failure to Communicate
One of the keys for turning generational conflict into productive teamwork is simply more effective communication. If people accommodate each others’ preferences, positive synergy can be created.

Traditionalists and baby boomers could check voice and email messages more frequently and try to respond promptly to requests for information. Gen Xers and millennials could switch from instant messaging and emails to using the phone more. This requires good talking skills. Be explicit and proactive. Do not use slang. Avoid filling gaps with “uh” and “umm.” In the prior scenario, everyone should be prepared to respond to messages immediately throughout the weekend.

When managing a team, baby boomers can cut back on lunch and breakfast meetings and try to adopt a fixed schedule if possible. Gen Xers and millennials could switch from instant messaging and emails to using the phone more. This requires extra effort to engage and give timely and useful guidance. Gen Xers need to understand this kind of feedback is not instantaneous and may have to be requested. Millennials need to accept criticism, avoid excuses, and improve their listening skills. In the present scenario, once Junior Partner formulates an outline of the memorandum, Senior Associate should get first crack at the rough draft. Later, Junior
Associate can be asked to add to it. Both Senior and Junior Partners have to temper their critiques with positive reinforcement. Both Senior and Junior Associates have to accept these critiques in the interest of personal growth.

Traditions and baby boomers should embrace alternative work styles and create organizational options. Gen Xers should understand that client service always comes first and face time is important to advancement. Millennials should realize that understanding and accommodating generational differences is still developing at most law firms. Personal needs do not come before client and firm needs. The goal in the scenario remains excellent client service. The senior lawyers need to allow the junior lawyers latitude in determining how to collectively reach that goal.

A Time for Mentors

When Ulysses went off to fight in the Trojan War, he left his trusted friend Mentor in charge of his son’s education. Thus “mentoring” came to mean the passing on of skills, knowledge, and wisdom. Mentors help lawyers acquire knowledge and skills more quickly and more effectively. They pass on the true art of the practice of law. Having an effective mentoring program at your law firm can help overcome many generational conflicts.

Mentoring requires active and focused learning. The mentee must be proactive, helping direct the relationship and set its goals. The mentor needs strong interpersonal skills, a wide range of appropriate experience, and personal enthusiasm. Both gen Xers and millenials need to know there is nothing wrong with asking for help developing a career. Traditionals and baby boomers need to welcome the opportunity to be a guide to sources of knowledge. Everyone needs to embrace the required commitment of time and confidentiality. Only through open and honest discussions will the trust and rapport necessary for an effective mentoring relationship be created.

Where We All Began

In 399 BC, Socrates went on trial for corrupting the youth of Athens and creating generational conflicts in the city. He questioned the established intellectual class of Athens, the statesmen, poets, and artisans, who thought themselves wise. Socrates proved these prominent Athenians were not wise. When his public questioning made them look foolish, they turned against him and created accusations of wrongdoing. A jury of Athenians found Socrates guilty and sentenced him to death by ingestion of hemlock. Among the next generation of his students was Plato, who together with Aristotle went on to lay the foundations of Western philosophy, logic, math, and science.

There always have been and will continue to be generational differences. The key to overcoming these differences and creating future success within law firms will come from improved communication, deeper understanding of shared values, and the expansion of mentor programs. These activities improve teamwork and encourage adaptation to change, which are necessary steps to building a competitive advantage in the marketplace.
Generations at Work:
Managing the Clash

Presented by:
Joel S. Aziere
Suzanne M. Glisch
Michael Moore
Tattoos
Piercings
Hair
Technology
Balance

1. Family
2. Work
The Next Generation

- Today's generation of young people are clearly "less career ambitious" than its elders.
- Citing data from MonitoringTheFuture.org, the report shows that today's high schoolers expect their lives to revolve less around work and more around vacation time than Gen-Xers — the generation born between the early 1960's and 1980's.
- Millennials also spend more of their leisure time on online activities like video games, social networking and watching TV online than their parents and grandparents, despite having similar internet access.
- Some other findings from the report: young people today make less money relative to the rest of the population than ever before, are more conscious of the value of the products they buy and are more likely to be living with their parents.
Attitudes about work and Leisure

Exhibit 7: Attitudes about work and leisure have changed. Relative to the earliest Generation Xers, today's high school graduates are on average less career ambitious and place a greater significance on leisure rewards responses to the Monitoring the Future questionnaire to high school seniors, sample size approximately 50,000 students.

- **AGREE / MOSTLY AGREE**
  - "To me, work is nothing more than making a living"
  - 1983: 25%, 2011: 35%

- **AGREE / MOSTLY AGREE**
  - "I expect work to be a very central part of my life"
  - 1983: 65%, 2011: 75%

- **AGREE / MOSTLY AGREE**
  - "I want to do my best in a job, even if this sometimes means working overtime"
  - 1983: 85%, 2011: 90%

- **RANKED VERY IMPORTANT**
  - "A job where you have more than 2 weeks vacation"
  - 1983: 15%, 2011: 30%

- **RANKED NOT IMPORTANT**
  - "A job where you have more than 2 weeks vacation"
  - 1983: 15%, 2011: 25%

Note: Monitoring the Future has been funded under a series of competing, investigator-initiated research grants from the National Institute on Drug Abuse, one of the National Institutes of Health. The lead investigators, in addition to Lloyd Johnston, are Patrick O'Malley, Jerald Bachman, and John Schulenberg—all research professors at the University of Michigan’s Institute for Social Research. Surveys of nationally representative samples of American high school seniors were begun in 1976, making the class of 2012 the 38th such class surveyed. Surveys of 8th and 10th graders were added to the design in 1991, making the 2012 nationally representative samples the 22nd such classes surveyed.

Source: monitoringthefuture.org
According to the study, both managers and Gen Y’s are on the same page when it comes to workplace success. However, while Gen Y workers have a positive view of their managers, believing that their managers can offer experience (59%), wisdom (41%), and a willingness to mentor (33%), managers have an overall negative view of their Gen Y employees. They feel said employees have unrealistic compensation expectations (51%), a poor work ethic (47%), and are easily distracted (46%).
Highlights from the 2013 Millennial Report

1. The skills managers look for when promoting Gen Y.
2. Managers are supportive of Gen Y’s entrepreneurial ambitions.
3. Managers are willing to support Gen Y’s who want to move around.
4. Social media’s role in and out of the workplace.
5. The manager and Gen Y relationship on social media.
6. Gen Y’s don’t get enough feedback at work and want mentors.
7. In-person meetings and email trump technology at work.
8. It takes time to become a manager so Gen Y’s have to be patient.
9. Advanced degrees aren’t required for advancement.
Section 7 of the National Labor Relations Act (NLRA) provides that union and non-union employees have the right to engage in activities that are both “protected” and “concerted.”

Employee may lose protection under the Act for public statements relating to an ongoing labor dispute that are so disloyal, reckless, or maliciously untrue as to constitute a disparagement or vilification of the employer’s product or reputation.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce an employee’s right to engage in Section 7 activities, such as by terminating an employee because of the employee’s protected concerted activities.

“Many view social media as the new water cooler....All we’re doing is applying traditional rules to a new technology." - Mark Pearce, NLRB Chairman
Employer Policies

The General Counsel concluded that employment policies prohibiting the following violated Section 8(a)(1) of the Act:

- Employees from posting pictures of themselves in any media which depict the employer in any way;
- Subjecting employees to discipline who, when internet blogging, chat room discussing, e-mailing, text messaging, or other forms of communicating, engage in inappropriate discussion about the company, management, and/or co-workers;
- Employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity;
- Any communication or post that constitutes embarrassment, harassment or defamation of the employer or any employee, officer, board member, representative, or staff member; and
- Statements that lack truthfulness or that might damage the reputation or goodwill of the employer, its staff, or employees.
Body Modifications: The good, the bad, and the ugly
Tattoos as Constitutionally Protected Free Speech

*Coleman v. City of Mesa, 230 Ariz. 352 (2012)*

- Arizona Supreme Court held that tattoos, as well as the process and business of tattooing, is purely expressive activity entitled to First Amendment protection.

*Anderson v. Hermosa Beach (9th Cir. 2010)*

- Ninth Circuit held that tattoos and the business of tattooing is protected by the First Amendment as “purely expressive activity.”
Does the First Amendment protection bar you from restriction

- NO!
  - A company has every right to discriminate against “optional” appearance-related traits like unusual hair styles, piercings, and tattoos.
  - Companies can limit employee’s personal expression on the job as long as they do no impinge on their civil liberties.
  - EEOC: Employers are allowed to impose dress codes and appearance policies as long as they do not discriminate or hinder a person’s protected class.
Practice Points

• Draft a dress code.
  ▫ If you truly want to prohibit such items, create a dress code.
  ▫ Have employees read and sign.
• No value judgments.
  ▫ If you are going ban visible tattoos, ban them all, regardless of content.
• Watch out for gender discrimination.
  ▫ Men and women must be treated in the exact same manner.
  ▫ Prohibition must apply regardless of location.
Tattoos or piercings as part of religious beliefs

- Employee has wrist tattoos as part of religious observation that employee said he could not cover because it would be sacrilege.
- Court determined employee had “sincere religious belief” and that Red Robin may have to accommodate.

**EEOC v. PAPIN ENTERPRISES, INC., (M.D. Fla. 2009)**
- Subway policy prohibited facial piercings, but, Plaintiff claimed nose ring was religious symbol.
- Court denied summary judgment, holding jury could decide whether the nose ring was a closely held religious belief.
Limits on religious beliefs

• A tattoo is not automatically protected simply because it is a religious symbol.
• Many religions condemn tattoos as defacing the body temple.
• The tattoo must be part of the religious belief.
• The covering of the religious tattoo must be prohibited by that religion.
Some Sample Company Policies

• Generally
  ▫ Betsy Johnson; American Apparel; Banana Republic; Financial Bank; Disney; Abercrombie & Fitch

• Formal policies prohibiting visible tattoos:
  ▫ Geico; USPS; Starwood Hotels; Denny’s

• Formal policies allowing visible tattoos:
  ▫ Allstate Insurance; Bank of America; Boeing; Wal-Mart; Ford Motor Company
Lawsuits regarding Tattoos

- Christopher Piggott, Deputy in Wood County, Ohio
- Talayna Clements, Exotic dancer in Washington D.C.
- Joanne Stronach, 39, Mother of 3 working at department store cafe
- Virginia Carter, Substitute teacher at West Florida High School
QUESTIONS?
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Professional Experience

Joel primarily defends employers in litigation involving all aspects of labor and employment cases, ranging from grievance arbitration to NLRB proceedings and actions before state and federal agencies. Joel defends employers in a variety of cases filed in state and federal court, including disputes involving discrimination and harassment, wage and hour issues, employment contracts, enforceability of non-compete clauses, whistleblower protections and wrongful termination. He has successfully defended numerous private employers in unfair labor practice charges before the NLRB, discrimination charges before the EEOC and ERD, and wage and hour claims before the Department of Labor and Wisconsin Labor Standards Bureau. Joel has represented clients in administrative, state and federal courts throughout the United States, including, but not limited to, the states of Wisconsin, Minnesota, Michigan, Illinois, Indiana, Louisiana, Pennsylvania, South Carolina, Georgia, and Tennessee. Joel also provides day-to-day advice on the full range of labor and employment topics, including counseling private employers during union organization and decertification campaigns.

Bar Admissions

- Wisconsin  
- Tennessee  
- United States District Court for the Eastern District of Wisconsin  
- United States District Court for the Southern District of Indiana  
- United States District Court for the Western District of Tennessee  
- United States District Court for the Northern District of Illinois  
- United States District Court for the Western District of Wisconsin  
- United States Court of Appeals for the Seventh Circuit
Practice Areas

Labor and Employment

Education

- Creighton University School of Law J.D., 1997
  - Honors: Summa Cum Laude
- Purdue University, B.S., 1994
  - Honors Engineering Program
- Judge Advocate Officer’s Basic Course, U.S. Army Judge Advocate General’s School
  - Commander’s List, U.S. Army Judge Advocate General’s School

Professional Activities/Recognitions

- Member, Labor & Employment Law Section
- Member, Wisconsin School Attorneys Association
- Member, Education Law Association
- Member, Employer Support for the Guard and Reserve (ESGR)
Michael F. Moore. JD is the founder of Moore’s Law LLC and helps lawyers, law firms and corporate law departments create professional success. His legal experience includes private practice, being a General Counsel, a legal recruiter and a law firm executive. Michael creates value for law firms with strategic growth initiatives and resource optimization. He creates value for lawyers with individual coaching in management and leadership. His articles in Wisconsin Lawyer magazine have addressed generational conflicts, work/life balance challenges and effective compensation programs. Michael is also the author of “The Lawyer’s Toolkit for Creating Both Personal and Professional Success” available from Thomson Reuters. For more information please visit www.moores-law.com. You can also view Michael’s profile on LinkedIn at Legal Coach or simply call him at (414) 467-5983.
Professional Experience

Suzanne’s primary focus is litigation where she defends employers in all aspects of labor and employment law including discrimination, retaliation, and harassment; disability, accommodations, and medical leave; employment contracts and agreements; restrictive covenants; and hiring, discipline, and discharge issues. She also drafts and reviews employment handbooks and agreements, including severance agreements and restrictive covenants.

Suzanne has successfully defended employers before state and federal courts and administrative agencies across the country. Her experience also includes advising clients on wage and hour issues, affirmative action and OFCCP compliance, and compliance with various state and federal employment statutes, including the Wisconsin Fair Employment Act, Title VII, ADEA, ADA, FLSA, and FMLA.

Bar Admissions

- Wisconsin
- United States District Court for the Eastern District of Wisconsin
- United States District Court for the Western District of Wisconsin
- United States district Court for the Western District of Tennessee
- United States District Court for the Northern District of Illinois
- United States District Court for the Eastern District of Michigan
- United States Court of Appeals for the Seventh Circuit
Practice Areas

- Litigation
- Labor and Employment

Education

- University of Wisconsin-Madison Law School, J.D., 2010
  - Honors: cum laude, Order of the Coif
- Miami University, B.A., 2007
  - Majors: Political Science and German
  - Honors: magna cum laude

Memberships

- Member, American Bar Association

Professional Recognitions

- Named a Rising Star by Wisconsin Super Lawyers® 2015
Matthew K. (Matt) Impola is senior counsel and a real estate business lawyer with Foley & Lardner LLP. Mr. Impola has represented clients in a wide variety of real estate matters, including the sale, purchase, development, construction, leasing and financing of commercial and residential real property. He is a member of the firm's Real Estate and Finance & Financial Institutions Practices.

Mr. Impola also has significant experience representing developers, owners and investors in negotiating leases, purchase and sale agreements, reciprocal easement agreements and site development agreements with national and regional retailers. Mr. Impola has also represented clients in connection with the acquisition, development, construction, leasing and financing of health care and assisted living facilities.

Mr. Impola has represented institutional investors, commercial banks and investment banks in a variety of complex commercial real estate loan transactions, including permanent loans, construction loans, mezzanine loans, mortgage loan originations for commercial mortgage-backed securitization programs, loan participations, loan sales and loan modifications.

In addition to his experience with the firm, Mr. Impola also has previous in-house experience as corporate counsel for Continental Properties Company, Inc., a national retail, multifamily and hospitality real estate developer, owner and manager.

Education

Mr. Impola earned his J.D. from the University of Wisconsin in 2000. His Bachelor of Arts degree in history was conferred, magna cum laude, by Loyola University of Chicago in 1997.

Admissions

Mr. Impola is admitted to practice in Wisconsin.
John Booher is Senior Manager – Environmental Standards at Kohl’s Department Stores. He leads a compliance team with emphases on supply chain, product information, hazardous waste, property, permitting, and regulatory interactions. He previously was Senior Counsel at Kohl’s, where he focused on real estate development, contracts and sustainability. John received his undergraduate degree from University of Chicago (AB, 1996 – Environmental Studies), law degree from University of Illinois College of Law (JD, 1999 cum laude) and EMBA from University of Wisconsin – Madison School of Business (2010).
Sarah A. Slack

Sarah Slack is senior counsel and an environmental lawyer in the Business Law Department at Foley & Lardner LLP. Ms. Slack is a member of the Environmental Regulation Practice and the Life Sciences and Energy Industry Teams. She divides her time between remediation/redevelopment work, environmental compliance counseling, transactions and environmental litigation. Ms. Slack has extensive experience on the cutting edge of Clean Air Act, Clean Water Act, Superfund, and RCRA enforcement, as well as citizen suit litigation, settlement strategies, and related cost recovery, insurance coverage, and indemnity disputes. Ms. Slack also provides counsel to clients regarding air emissions, waste management, underground storage tank compliance, and water discharge permitting and compliance.

Publications
Ms. Slack is the author of "When is a Pesticide Not a Pollutant? Never: An Analysis of the EPA’s Misguided Guidance," 90 Iowa L. Rev. 1241.

Recognition
Ms. Slack was selected to the 2013 - 2015 Wisconsin Super Lawyers – Rising Stars® lists.

Education
Ms. Slack received her B.A. in French from Grinnell College, with a concentration in Western European studies. She received her law degree, with high distinction, from the University of Iowa College of Law, as well as an M.S. in urban and regional planning, focusing on environmental and land use planning. During law school, Ms. Slack was the senior note & comment editor for the Iowa Law Review and elected to the Order of the Coif. Ms. Slack also served on the boards of the Moot Court Program, and the Organization of Women Law Students and Staff.

Admissions and Professional Memberships
Ms. Slack is admitted to practice in Wisconsin and California.

Ms. Slack is a board member of the Environmental Law Section of the State Bar of Wisconsin.
Top 10 Real Estate Documents In-House Counsel Will Be Asked to Review and What You Should Know About Them
1. REAL ESTATE PURCHASE AGREEMENTS:
   » Description of the property and purchase price
   » Earnest money, how much and when does it become non-refundable?
   » Due diligence, title and survey review, environmental review, physical inspections
   » Representations and warranties
   » Closing costs
   » Defaults and remedies
   » Subdivision issues
2. ACCESS AGREEMENTS:
   » Seeking access for environmental inspections, reports, and sampling
   » Various third parties
   » Cooperation – may be required by law
   » Consideration
     • Timing and Term
     • Insurance
     • Indemnities
     • Results
3. TITLE COMPANY AFFIDAVITS/INDEMNITIES:

» Owner’s affidavit
» Gap indemnity
» Construction lien indemnity
» Non-imputation indemnity
» ALTA statement
» Limit indemnities to current title policy (not all future policies)
» Limit “to knowledge”
» Exclude any representations about survey matters or matters covered by title search
4. ESTOPPEL CERTIFICATES:
   » Timeline for response
   » Confirm lease information
   » Estoppel should **not** amend lease
   » Consequences for failure to respond
   » Limit “to knowledge”
5. SNDAs:
   » What is an SNDA?
   » Lender form may amend the lease terms
   » Timeline for response and consequences for failure to respond
6. PHASE I ENVIRONMENTAL SITE ASSESSMENTS AND RELIANCE LETTERS:

» Appropriate standard – ASTM E1527-13
» Valid for 180 days
» Relying parties – reliance letters
» RECs/CRECs/HRECs
» De Minimis conditions
7. LISTING AND BROKERAGE AGREEMENTS:

» When is commission due?
» How is commission calculated?
» What are listing broker’s obligations?
» What are owner’s/seller’s obligations?
» What is term of listing and is there a tail?
8. PHASE II AND RELIANCE LETTER:

» Purpose?
» What media sampled?
» No specific ASTM standard – but EPA sampling methodologies
» Results can show:
  • No releases
  • Releases
» Wisconsin – broad requirement to report releases
» Reliance
9. UTILITY EASEMENTS:

» Is Lender consent required?
» Review location; reserve right to relocate
» Improvements allowed in easement area?
» Payment for easement
» Restoration of the property
» Grantee should indemnify owner for anything arising out of use
10. AGENCY COMMUNICATIONS:
» Responsible Party Lenders
» VPLE – Certificate of Completion
» Closure Letters – NFA, NAR
» Comfort Letters
» Off-Site Exemption Letters
**BONUS DOCUMENTS:**

» **Architect’s Agreements**
  - AIA forms
  - Duties of architect
  - Fees and costs
  - Ownership of plans and specifications
  - Cooperation with owner and contractor
  - Liability of architect

» **Construction Contracts**
  - What type (GMP, cost plus fee, design-build, etc.)
  - Who is contractor (bonded?)
  - Completion date (penalties for late delivery)
  - Description of the work
  - Warranties
BONUS DOCUMENTS:

» Property Management Agreements
  • Duties of property manager
  • How is management fee calculated?
  • How are costs and expenses reimbursed?
  • Budget preparation
  • Term and replacement of property manager

» Subleases/Licenses
  • Description and separate demising of subleased space
  • Master lease provisions and consent of master landlord
  • Extent of subtenant responsibility for master lease provisions
  • Default under master lease (recognition of subtenant)
Contact Information

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