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# Developing Trends in Bet-the-Company Class Actions

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# Presenters



## JOSHUA BRIONES

*Managing Member, Litigation Practice*

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310-226-7887

- Highly experienced trial lawyer with a national practice. He has received awards and national recognition for his innovative approach to the defense of bet-the-company litigation
- Served as lead defense counsel on over 550 alleged class actions in state and federal courts across the country including successfully defending class actions on behalf of Sabre Inc., The Los Angeles Lakers, Inc., Cavaliers Operating Company, Pay Pal, Inc. eBay, Inc., CVS Pharmacy, Yelp, among many others.
- Successfully defended over 200 TCPA class actions over the last decade. He defends clients on TCPA faxing, prerecorded voicemail messages, mobile calls, and text messages. Regularly defends class actions alleging false or deceptive marketing as well as ADA Website Accessibility Class Actions brought under the ADA, Unruh Act, or state-specific consumer protection statutes across the US. and achieving extremely favorable settlements.



## ARAMEH Z. O'BOYLE

*Member, Litigation Practice*

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- Experienced litigator who focuses her practice on defending product manufacturers in complex product liability and consumer class action litigation.
- Represents businesses in a variety of industries including cosmetic, personal care products, medical device, pharmaceutical, over-the-counter drugs, food, retail, and electronics. She regularly advises clients on product labeling and advertising strategies to navigate the requirements of the FDA's Food, Drug, and Cosmetic Act and mitigate challenges under California's consumer protection laws.
- Particular expertise in representing clients in consumer product class action litigation involving violations of California's Consumer Legal Remedies Act, Unfair Competition Law and other deceptive, false and misleading advertising laws. Represents companies in high-profile litigation and has extensive experience managing and coordinating complex class action and multidistrict litigation.



## CRYSTAL LOPEZ

*Associate, Litigation Practice*

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- Focuses her practice on class action defense, with an emphasis on consumer fraud, data privacy, marketing, accessibility, technology and compliance issues.
- Extensive experience successfully defending against class action claims brought under the Telephone Consumer Protection Act, the Americans with Disabilities Act (ADA) Title II, III and state accessibility law compliance and public accommodations, Unfair Competition Laws, False Advertising Laws, the Fair Credit Reporting Act, the Hobby Protection Act and Auto-Renewal Law in both state and federal courts.
- Defended corporate clients against class actions at all stages of litigation, including through class certification, preliminary, and final approval of settlements. She has a track record for early and efficient dispute resolution and saving costs associated with discovery through early informal negotiations, mediation and class action settlements.

# Presenters cont'd



## **ESTEBAN MORALES**

*Associate, Litigation Practice*

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- An experienced litigator whose practice is principally focused on class action defense and financial services litigation.
- Has successfully defended both small and large corporate clients targeted in class action suits alleging violations of various federal and state statutes, including the Telephone Consumer Protection Act, the Fair and Accurate Credit Transactions Act, California's Unfair Competition Law, and California's Invasion of Privacy Act.
- Previously served as In-house Counsel for a major broker-dealer with thousands of registered representatives stationed throughout the country where he litigated cases, routinely interfaced with insurance carriers and brokers, managed outside counsel, and advised on regulatory matters.



## **ADAM KORN**

*Associate, Litigation Practice*

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- Experienced in wide range of complex commercial litigation, with an emphasis on consumer fraud, contract disputes, and product liability defense.
- Maintains a robust pro bono practice assisting clients seeking Asylum in the United States and their Board of Immigration Appeals.
- Prior to joining Mintz, Adam was a Judicial Law Clerk to the Hon. Steve Kim, at the United States District Court for the Central District of California.

# Program Overview

- The presentation will cover class action trends in both federal and state court as well as provide an overview of what to expect from the Plaintiff's bar nationwide.

The presenting panel includes attorneys who specifically deal with class action cases that are on the forefront of developing precedent. The presentation will highlight the 2021 updates in consumer class action litigation including:

- The impact of *Facebook, Inc. v. Duguid* and *TransUnion L.L.C. v. Ramirez* on TCPA litigation
- Recent developments in UNRUH and ADA web accessibility litigation
- Continued growth of California false advertising cases as a basis for federal class action
- Trends in data breach class action litigation

# *Facebook v. Duguid* – What is an Automatic Telephone Dialing System?

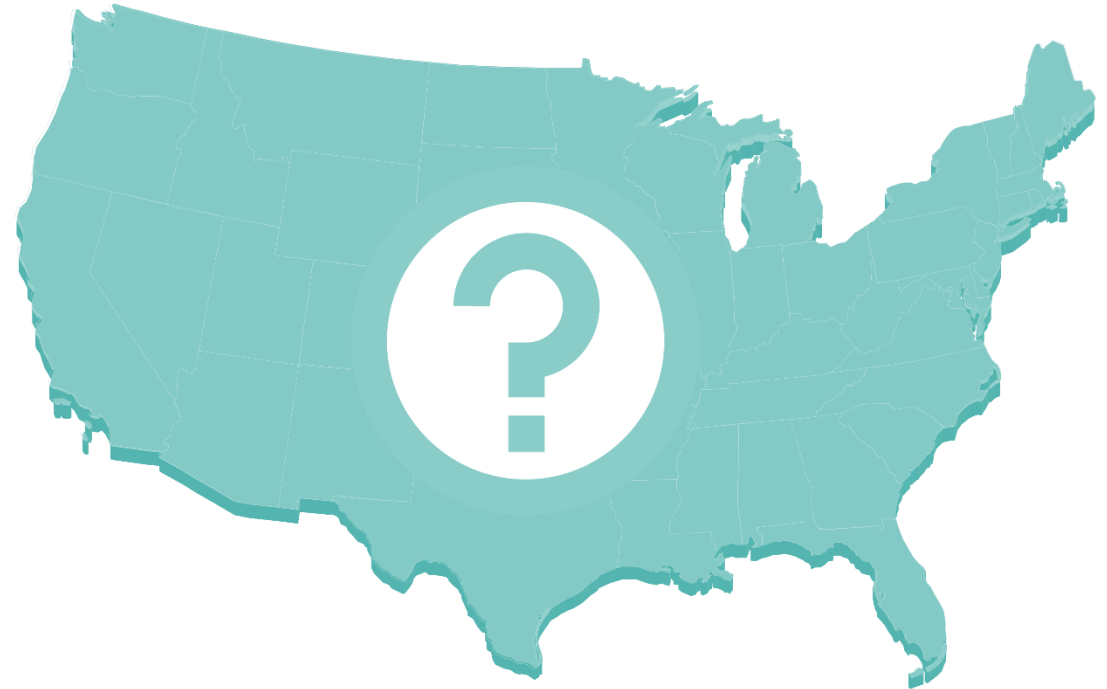
Statutory Language:

(1) The term “automatic telephone dialing system” means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, **using a random or sequential number generator**; and

(B) to dial such numbers.

*Facebook*: “In sum, Congress’ definition of an autodialer requires that **in all cases**, whether storing or producing numbers to be called, the equipment in question **must use a random or sequential number generator**.”



# Facebook at Summary Judgment

Calling Solution	Case
Aspect Unified IP (calls)	<i>Grome v. USAAA Sav. Bank</i> , No. 19-cv-3080, 2021 U.S. Dist. LEXIS 164255 (D. Neb. Aug. 31, 2021)
Aspect Unified IP (calls) Aspect Agent Initiated Contact (calls)	<i>Timms v. USAA Fed. Sav. Bank</i> , No. 18-cv-01495, 2021 U.S. Dist. LEXIS 108083 (D. S.C. June 9, 2021)
Avaya Proactive Contact (calls)	<i>Barnett v. Bank of Am., N.A.</i> , No. 20-cv-272, 2021 U.S. Dist. LEXIS 101171 (W.D. N.C. May 28, 2021)
Oracle Responsys Interact (texts)	<i>LaGuardia v. Designer Brands Inc.</i> , No. 20-cv-2311, 2021 U.S. Dist. LEXIS 170704 (S.D. Ohio Sept. 9, 2021)
LiveVox (calls)	<i>Russell v. Taylor Law, PLLC</i> , No. 17-cv-29, 2021 U.S. Dist. LEXIS 207677 (N.D. Ind. Oct. 27, 2021)
LiveVox RPC and QC (calls)	<i>Williams v. Schank</i> , No. 15-cv-01434, 2021 U.S. Dist. LEXIS 116218 (N.D. Ala. June 22, 2021)

- See also *Kuch v. Phh Mortg. Corp.*, No. 16-cv-00056, 2021 U.S. Dist. LEXIS 165456 (W.D.N.Y. Aug. 31, 2021) (involving LiveVox HCI and denying summary judgment for defendant; issues regarding declarant’s knowledge and whether artificial voice was used)

# Litigation Post-*Facebook*

- **“Artificial or Prerecorded Voice” Claims**

- Cell Phones: 47 U.S.C. § 227(b)(1)(A)(iii)
- Residential Phones: 47 U.S.C. § 227(b)(1)(B)

- **Do Not Call Claims**

- “Residential” Phones on the DNC: 47 C.F.R. 64.1200(c)(2)
- Opt Out List Procedures for Telemarketing Calls to “Residential” Phones: 47 C.F.R. 64.1200(d)

- **State Law Claims**

- Florida Telephone Solicitation Act, Fla. Stat. § 501.059

# UNRUH and ADA Web Accessibility Litigation

- **The Americans with Disabilities Act (ADA)** requires that every business or organization must make their organization accessible to people with disabilities.
- **The California Unruh Act** requires that all persons within California are treated equally, including for any facilities, services, or business establishments. - \$4,000 in statutory damages.
- U.S. companies have been inundated with lawsuits in the past several years alleging that their websites do not comply with the ADA and various state laws, including the Unruh Act.
- In 2020 alone, approximately 11,000 ADA Title III lawsuits were filed in federal courts including more than 2,000 lawsuits related to website accessibility. The number of these claims is expected to grow in 2021 and beyond.



# Key 2021 ADA/Unruh Cases

- **Winn-Dixie**

- The 11th Circuit (in a 2 to 1 decision), held that Winn-Dixie did not violate the ADA by maintaining a website that was inaccessible to visually impaired individuals reliant on screen readers because websites were not listed as “places of public accommodation.”

- **Robles v. Domino’s Pizza**

- After five years of litigation, on remand from the Ninth Circuit’s decision, CD Cal granted the plaintiff’s motion for summary judgment, holding that Domino’s violated the ADA because its website was not fully accessible to visually impaired individuals.

- **Serial litigants (Thurston v. Omni Hotels Mgmt)**

- Appeals court affirmed the jury verdict to the defendant hotel management corporation where the jury determined that the plaintiff did not possess a “bona fide intent” to use the defendant’s services, which is required to have standing to bring a claim under Unruh Civil Rights Act.

# False Advertising: Class Action Trends

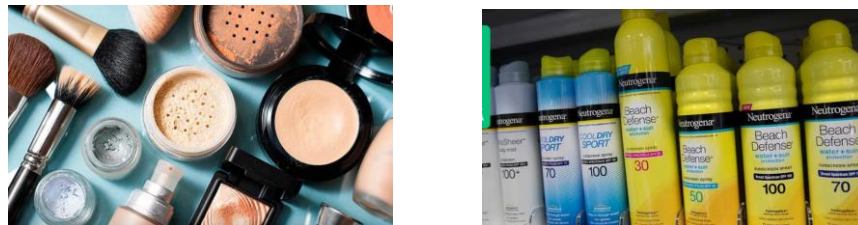
- **Flavored Foods**



- **“Natural” and “Non-GMO”**



- **“Toxic” Makeup and Sunscreen**



- **“Green” Claims**



# False Advertising: Experts and Rule 702

- **FRCP Rule 702**

- *A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:*
  - *(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
  - *(b) the testimony is based on sufficient facts or data;*
  - *(c) the testimony is the product of reliable principles and methods; and*
  - *(d) the expert has reliably applied the principles and methods to the facts of the case.*

- **Consumer Survey Evidence in the Ninth Circuit**

- **WEIGHT vs. ADMISSIBILITY**

- **Proposed Amendments**

# Standing in Data Breach Class Actions

- *McMorris v. Carlos Lopez & Associates, LLC*, 995 F.3d 295 (2d Cir. 2021)
  - Three-factor Test: (1) exposure (2) misuse and (3) high risk of identity theft or fraud.
- *McMorris* Test Applied
  - *Pena v. Brit. Airways, PLC*, 849 F. App'x 13, 14 (2d Cir. 2021)
  - *Peiran Zheng v. Live Auctioneers LLC*, Case No. 20-CV-9744 (JGK), 2021 WL 2043562, at \*3 (S.D.N.Y. May 21, 2021)
  - *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1263 (11th Cir. 2021)

# Standing post *TransUnion v. Ramirez*

- *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)
  - “the mere risk of future harm, standing alone, cannot qualify as a concrete harm.”
- Post *Ramirez* Data Breach Cases
  - *In re Blackbaud, Inc., Customer Data Breach Litig.*, No. 3:20-mm-2972-JMC, 2021 WL 2718439 (D.S.C. July 1, 2021)
  - *In re GE/CBPS Data Breach Litigation.*, No. 1:20-cv-02903-KPF, 2021 WL 3406374 (S.D.N.Y., Aug. 4, 2021).
  - *Cotter v. Checkers Drive-In Restaurants, Inc.*, No. 8:19-cv-1386-VMC-CPT, 2021 WL 3773414 (M.D. Fl. Aug. 25, 2021)

# Settlement Trends in Data Breach Class Actions

- Settlement Structure: (1) claims made settlement with cap or (2) settlement fund
- Length of litigation does not impact settlement value
- Nature of exposed data does not impact settlement value
- Few objectors or appeals

**Questions?**

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**THANK YOU**