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# FOCUS

## President's Letter

**Aline V. Drucker**

It's the most wonderful time of year... again. Already?! Before we know it, Groundhog Day will be here soon, both the holiday and the film, when Bill Murray, at his "Murray-est," will intone his winter prediction that it's gonna be cold, it's gonna be gray, and it'll last for the rest of your life. Fortunately for us, we still get to enjoy the full holiday season unfolding before us now, and the sunny skies of South Florida keep those winter blues at bay all year round.

This is the time of the year when we become the envy of most of the rest of the nation for our glorious winter months of spectacular weather, healthy and easily obtained natural doses of vitamin D, and inviting ocean breezes. I moved to Florida a number of years ago when I was an associate at a big law firm in New York, after many years of living, studying and working in the Northeast. Interviewing on Brickell in the heart of the financial district on one such pristinely sunny January morning that only exists in our neck of the woods, I was amazed that people get to work in this environment, in those big shiny buildings with waterfront views, and sun pouring into the conference rooms. And people were genuinely expected to interact with others, attend in-person client meetings, and sit in with senior partners to strategize.

This was shockingly different from the New York model that I was so used to, in the absence of any other way of doing things, where you muscled through the

Murray-painted universe of never-ending grayness, and existed as an extension of your email inbox, always behind the protective cocoon of your computer screen and signature block. As such, upon moving to South Florida and starting my career path in private practice and, later, in-house, has made me what some refer to as a "Miami apologist." I love it all here. It just fits. And it clicked for me long before it became uber trendy and the crypto bros descended upon us. I put up with the traffic, and the crazy drivers, and the general sense that nothing ever starts on time. But what I really love is the profound sense of home that settled in once I moved here. I love the multi-cultured, multi-layered community we have here from Calle Ocho, to Hollywood, to the upper reaches of Hobe Sound beaches. I am a walking advertisement for Florida and its lifestyle options. Most of my friends who are life-long Floridians are quick to point out the all-too-well-known flaws, which have become clichés. And yet, it's like the Hotel California over here, you can check out anytime you like



ACC South Florida 2022-2023 Board of Directors

but you can never leave. The few that do, often return. And so, at this time of the year, in particular, I think it is the best time to show gratitude for all that we have and all that we are able to do in our vibrant community.

The ACC celebrated this festive time with two holiday parties, one in Miami Dade and another in Palm Beach County. We are very excited for all the stellar and interesting programming that is in store for our members in 2023. For now, let me take this time to wish each of you a very Happy and Healthy Holiday Season - Merry Christmas, Happy Hanukkah, and no matter what your holiday traditions are, may all of us be filled with peace and gratitude now and in the New Year ahead.

# Website Tracking: What Every In-House Lawyer Must Know (Now!)

By Al Saikali, Chair, Privacy and Data Security Practice, Shook, Hardy & Bacon, LLP

The biggest data privacy litigation risk that companies currently face is class action lawsuits based on their use of website tracking technology. These lawsuits fall into two general categories: wiretap claims and pixel lawsuits. This article describes the technology at issue, the tsunami of litigation sweeping across the country, and the measures companies can take to mitigate their risk.

## Takeaways

Companies using website tracking technology (e.g., session replay, chat bots, and pixels) face significant class action lawsuit risks based on alleged unauthorized recording and sharing of website user information. Adequately disclosing the technology via a pop-up can mitigate this risk. In the longer term, legal, marketing, and IT/website development departments must meet regularly to proactively identify and mitigate such risks.

## The Technology

Website tracking tools help companies understand how users interact with their site. This article won't get too in the weeds, but at a high level the tracking tools most subject to litigation are:

- *Session replay* — code on a website that allows the company to track how the visitor interacts with the website, which allows them to identify, for example, what are the popular areas on the site, how to convert visitors into purchasers, and whether consent for email/telephone marketing campaigns were completed.
- *Pixels* — code that allows a company to track a visitor's website activity and share information about the visitor with third parties (like Meta), which allows the companies to target advertising.
- *Chat bots* — the “Talk to an Agent” features we encounter in the corner of a website that allow you to “chat” with a live agent or receive automated responses to common questions.

There are privacy tools that can be used with these technologies that mask or limit the collection of identifiable information. Marketing (and increasingly Compliance) departments LOVE these tools for obvious reasons. But they often incorporate them without vetting their risks, which leads us to where we are today.

## What Are The Legal Risks?

A tidal wave of lawsuits have been filed recently throughout the country against companies that use website tracking tools. These lawsuits fall into two categories, depending on the website-tracking tool at issue: state wiretap laws and pixel litigation.

### Category 1 – State-Wiretap Laws: Session Replay and Chat Bots

Companies that use session replay or chat bots are defending lawsuits claiming that the undisclosed use of those tools violated state-wiretap laws prohibiting the surreptitious interception of the content of communications. Plaintiffs are filing the lawsuits in states that have two-party consent laws, with the most frequent jurisdictions being California, Florida, Pennsylvania, Missouri, and Massachusetts. The wiretap laws create private rights of action that allow individuals to recover hundreds or thousands of dollars “per violation” and the plaintiffs allege that a “violation” should be measured by the number of website visitors from the state at issue. In other words, the lawsuits are potentially crippling.

Plaintiffs filed approximately 50 similar lawsuits in early 2021 throughout Florida in an attempt to create precedent they could leverage into a much larger wave of such lawsuits. The attempt backfired. Instead, courts dismissed the lawsuits. In their dismissal opinions, the Florida courts reasoned that: (1) the information being intercepted was not “content”; (2) in many cases the interception was not surreptitious; (3) commercial website visitors had no reasonable expectation of privacy over their communications with

the site; and (4) a Florida-specific business exception to the wiretap law prevented the claims from proceeding.<sup>1</sup> Plaintiffs attempted to pivot to allegations that chat-bot technology, not session replay, were the real problem. But the courts rejected that strategy too. Shortly thereafter, plaintiffs voluntarily dismissed most of the remaining lawsuits.

Like a zombie, however, the lawsuits are back because of two U.S. Circuit Court decisions arising from cases in California and Pennsylvania: *Javier v. Assurance IQ, LLC* (9<sup>th</sup> Cir. May 2022) and *Popa v. Harriet Carter Gifts* (3d Cir. Aug 2022). Those opinions allowed wiretap violation allegations to proceed against companies that used session replay on their sites but did not timely disclose the use of that technology. Within one month of the Third Circuit's decision, plaintiffs filed ten new lawsuits in Pennsylvania. It is now typical for two or three of these lawsuits to be filed *every day* in states with two-party consent requirements.

### Category 2 – Pixel Litigation

A second wave of lawsuits targets companies that use pixel technology on their websites. The defendants fall into two groups. The first group is comprised of companies that embed pixels in videos on their websites to determine whether the visitor has certain status (like a “subscriber”) that would allow the visitor to view the video. These lawsuits allege that the websites share this status with Meta to target ads to the individual in violation of the Video Privacy Protection Act, which creates a private right of action for statutory damages.

The second group of pixel lawsuits targets HIPAA-covered entities that have health portal sites with embedded pixel technology. Patients visit the portal to schedule appointments or otherwise communicate with the healthcare provider, and the pixel records information the patient enters on the site and sends that data to third parties. Regardless of whether the healthcare providers intended to capture that

<sup>1</sup>Shook obtained the first two federal court dismissals of these lawsuits, which was integral to the wave of dismissals. See *Cardoso v. Whirlpool* (S.D. Fla. Sep 2021), and *Connor v. Whirlpool* (S.D. Fla. Sep. 2021).

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information with the pixel, the use of the pixel can result in the sharing of protected health information with a third party with whom there is no business associate agreement (e.g., Meta). Because HIPAA does not create a private right of action, plaintiffs have latched onto legal theories similar to those in data breach cases – negligence, violation of a fiduciary duty, invasion of privacy, and breach of implied/express contract.

Two courts have already denied motions to dismiss in pixel lawsuits: *Lebakken v. WebMD* (N.D. Ga. Nov. 2022) and *Ambrose v. Boston Globe Media Partners* (D. Mass. Sep. 2022). Additionally, Mass General Brigham agreed to pay \$18 million to settle such a lawsuit. These developments have only exacerbated the tide of lawsuits. Several are now filed weekly, with over 70 docketed in the last two months.

### Mitigation Techniques

The standard approach of pointing to a privacy policy is not sufficient to mitigate risk. Because the complained-of behavior begins the moment the user arrives on the site, you need something alerting them to the tracking before they scroll to a notice at the bottom of the site. Indeed, the Ninth Circuit in *Assurance IQ* rejected the argument that notice at the bottom of a website is sufficient.

Fortunately, you can take three relatively easy steps to mitigate the litigation risk associated with using session replay, chat bots, or pixel technology. First, disclose the use of the technology in a pop-up banner that appears when a user first visits the site. The pop-up should provide a link to the company's website privacy notice and terms of use, which should provide more full-some explanations of the website tracking technology. Just be careful not to believe that an existing "cookie banner" automatically covers this risk. And, if you use chat functionality, you should also include a link to the disclosures in the "chat box" that pops open to begin the conversation.

Second, consider adding arbitration provisions to your terms of service and any rewards/membership agreements. Just be careful in enforcing them. Some of the plaintiffs' firms filing these lawsuits are comfortable bringing mass arbitration claims, and the costs associated with defending mass arbitrations can dwarf any settlement of a class action lawsuit. Nevertheless, an arbitration provision will make your company less appealing to the plaintiffs' bar.

Third, take a deep dive into the website tracking technology your company is using. Understand why you are using it, what disclosures you are providing, and whether

you are effectively using privacy features in the technology (e.g., masking or limiting collection of personal information). Based on those results, evaluate whether there are additional measures you need in place – such as a business associate agreement.

Unfortunately, these are just forward-looking solutions. They will not eliminate the risk of claims based on earlier uses of tracking tools without adequate disclosures. But they will help you avoid being the "slowest gazelle." Nor will they solve the bigger problem many companies face, which is the lack of communication between stakeholders. This leads to my final piece of advice: schedule a standing quarterly meeting between the Legal, Marketing, IT/Website Development, and Compliance functions. Ideally it should be moderated by outside or in-house privacy counsel who can talk about these trends/risks and how to mitigate them.

### Author:

**Al Saikali** chairs the Privacy and Cybersecurity Practice from the Miami office of Shook, Hardy & Bacon. Al is currently the only Florida lawyer ranked by Chambers USA as a nationally leading practitioner in Privacy and Cybersecurity Law.



## What's in the Water (or Coffee)? Uptick in Unionization at Starbucks and Beyond

By Ken Yerkes and Colleen Naumovich, Barnes & Thornburg

Many employers are aware of the recent uptick in union organizing with many high-profile union campaigns becoming front-page headlines - Amazon, Starbucks, Trader Joes, Chipotle, just to name a few. [Data reported by Bloomberg Law](#) from the first half of 2022 shows that unions have won more elections in 2022 than they have in nearly twenty years. According to the data, unions have won nearly seventy-seven percent of elections in 2022, the highest percentage since 2000.

So what exactly is causing this surge? There is no one, single answer to that FAQ, but the COVID-19 pandemic cer-

tainly played a large role in galvanizing employees to organize as working conditions and the employment relationship drastically changed as a result. Frankly, some employers executed better than others in responding. The tight labor market has also added to the pro-organizing atmosphere. In addition, highly publicized organizing efforts at high visibility companies like Starbucks likely had a domino effect in leading to more union campaigns. The first company-operated Starbucks store [unionized](#) in December of 2021, and more than 200 company-operated locations have [followed suit](#)

[since](#). Still, only three percent of the nearly 9,000 company-operated stores around the country are [unionized](#).

Employers always must walk a fine line between making good, timely business decisions and unlawfully interfering with employee organizing. Just recently, the NLRB's Los Angeles Regional Director filed a complaint against Starbucks CEO Howard Shultz for allegedly making illegal, anti-union threats during an employee meeting. The [complaint](#) alleges

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that Shultz illegally promised better benefits to non-union stores to coerce employees into abandoning their union support. Starbucks has moved to [dismiss](#) the complaint, arguing that the NLRB's strained interpretation of the National Labor Relations Act would allow an "inescapable unfair labor practice trap." Starbucks argued that it has the right to raise salaries and improve other benefits for any nonunion employee for any lawful reason. These allegations illustrate the frustrating position employers can often find themselves – "unfair if you do; unfair if you don't."

Starbucks has also taken aim at the NLRB in a [public letter](#), accusing it of colluding with a union to manipulate elections. The letter accuses the NLRB of significant mischief:

- providing the union duplicate—and triplicate—ballots when undelivered ballots were to be requested by the employees, not the union;
- individualized voting arrangements for select voters facilitated by the union, when all employees were to vote by mail-in ballot;
- disclosing non-public real-time information to the union regarding votes received;
- mishandling ballots;
- concealment of misconduct and lack of neutrality; and
- Board misconduct and lack of neutrality in unfair labor practice cases.

Starbucks claims a "career NLRB professional" provided the Company with inside information corroborating its allegations. This is not the first time a company has accused the NLRB of election-related misconduct. Amazon [accused](#) the NLRB regional office that oversaw the election at Amazon's Staten Island facility of acting impartially and facilitating the union's victory by artificially reducing the number of employees in the bargaining unit, delaying investigation of unfair labor practice charges, and failing to properly staff polls.

So what does all of this mean for employers? Union organizing at Starbucks began to [taper](#) off in the summer, with under 10 petitions filed in August as opposed to about 70 in March, illustrating some success in Starbucks' union-free campaigns. However, a pro-union landscape has already taken shape, in part driven by the current political administration. President Joe Biden has promised to be the "most pro-union president in history" and NLRB General Counsel Jennifer Abruzzo has been vocal about advancing a pro-union agenda. Against this backdrop, unions will likely be galvanized to increase organizing efforts for the foreseeable future. Employers should therefore be proactive in maintaining effective communication strategies with employees and organizational transparency to reduce the likelihood of union activity in their own backyard.

If unionization efforts start to surface, employers should first obtain legal counsel before reacting or taking any action. As explained above, employers must delicately balance responding to unionization efforts and not violating labor

law. Nonetheless, management has the right to communicate with its employees and campaign against the union. In fact, active listening and positive response can be effective tools leading to employees rejecting a union. In sum, employers should take care now and train supervisors on how to communicate with workers during an organizing campaign should they face one. As the saying goes, "if you fail to plan, you plan to fail."

### Authors:

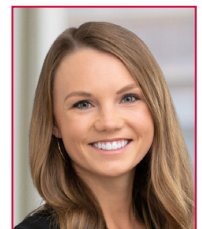
**Kenneth J. Yerkes**, Chair of the firm's

Labor and Employment Department for two decades, and was named to The National Law Journal's inaugural Employment Trailblazer's list, Ken Yerkes has spent over 30 years successfully fighting for his clients' rights and business objectives at the bargaining table, in arbitration and federal and state court, as well as in plants across the country through proactive training, counseling and union avoidance campaigns.



**Colleen Naumovich**, A detailed-oriented and strategic thinker,

Colleen is committed to helping her clients navigate the ever-changing field of labor and employment law, understand how the laws affect every facet of their business, and implement best practices. Colleen brings focus and dedication to assisting her employer clients with various workplace and employee needs they have in both traditional labor and employment relations.



## ACC South Florida Upcoming Events

### JANUARY

January 17  
Member Appreciation Event –  
Utilizing Social Media Platforms  
to Grow Your Network  
presented by Akerman

### FEBRUARY

Date TBD  
Cooking Class  
presented by Shook, Hardy & Bacon

### MARCH

March 8  
Social Event  
presented by Bilzin Sumberg

## NEW BOARD MEMBER SPOTLIGHT



### Christopher Aird

Assistant General Counsel

MasTec, Inc.

#### 1. How long have you been an ACC South Florida member?

I've been an ACC member since March 2022. I joined a month after transitioning in-house.

#### 2. Why did you join the ACC? I

was somewhat familiar with the ACC before going in-house but never had the opportunity to meet with its members or host/attend any of its events. When I transitioned in-house friends and coworkers recommended the ACC to me and encouraged me to join. After attending a few events I quickly realized that the ACC was a great way to network and collaborate with other in-house attorneys, as well as outside counsel, and

also to develop new friendships with interesting people.

#### 3. What is a typical day like for you at MasTec?

It feels like no two days are ever alike. There's always something new! I usually start my work day by reviewing and updating two separate to do lists, i.e. my list of things that have to get done that day and my list of things that can be addressed later in the week. But the unexpected happens every day and plans have to adjust on the go. A typical day always involves keeping up with emails and video calls.

#### 4. What do you most enjoy about being in-house?

I enjoy being able to focus on one client (and its multiple divisions). Being in-house allows me to invest the time to really learn the business and to get to know the people that make up the company.

**5. When you're not working, where would we find you?** Spending time with my family. Preferably doing some kind of outdoor activity like bike riding, going to the pool/beach, or running.

**6. What's your favorite book, quote or song right now?** "In the midst of chaos, there is also opportunity" Sun Tzu.

**7. Tell us something that might surprise us about you.** I started off on a completely different career path. I got my MBA and worked with Merrill Lynch before deciding to go back to school to study law.

## Welcome New Members!

### Rosemary Aleman

TelevisaUnivision

### Lara Bach

TelevisaUnivision

### Jayne Berger

Florida Crystals Corporation

### Camila Bitaraes

IRI Worldwide

### Jaime Borja

ADP

### Rita Chertorivski

TelevisaUnivision

### Katsi Colon

TelevisaUnivision

### Justin Davidson

Zoom

### Kara Kelly DeRosa

ABB Inc.

### Jaclyn Genchi

Arthrex, Inc.

### Sharlene Gonzalez

Oath Holdings Inc.

### David Guerrieri

Envision Healthcare Inc

### Nina Harrison

TelevisaUnivision

### Alvaro Jeanneau

TelevisaUnivision

### Luciane Juliani

777 Partners LLC

### Michael Klevens

Embraer Aircraft Holding Inc

### Frank La Fontaine

TelevisaUnivision

### Elan Lowenstein

Early Charm Ventures

### Rebecca Marine

Foley Carrier Services, LLC

### Sherri Morissette

National Dentex

### Samantha Nahra

Seamless.AI

### Anaeli Petisco Rojas

TelevisaUnivision

### Valerie Pozo

TelevisaUnivision

### Adrianna Rodriguez

TelevisaUnivision

### Susanne Schurad

The Swatch Group (U.S.) Inc.

### Jessica Silver

MasTec, Inc.

### Frank Simone

KW Property Management & Consulting LLC

### Elizabeth Stone

Virgin Hotels, LLC

### Antoinette Theodossakos

Morse Life

### Luis Valdez-Jimenez

PSCU

### Pablo Yacub

TelevisaUnivision



## EVENT PHOTOS

### General Counsel/Chief Legal Officer Dinner – Presented by FTI Consulting



### Cocktail Talk CLE Seminar – Presented by Gunster





**Miami Dade Progressive Dinner** – Presented by Saul Ewing, Foley & Lardner and Jackson Lewis



**Palm Beach Holiday Party** – Presented by Barnes & Thornburg





## Miami-Dade Holiday Party – Presented by DLA Piper



### Sponsors for 2022

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FordHarrison LLP

Gunster

Littler

Shook, Hardy and Bacon, LLP

#### Silver

Baker McKenzie

Barnes & Thornburg

Bowman and Brooke LLP

DLA Piper

Carlton Fields

Jackson Lewis P.C.

Squire Patton Boggs

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#### Bronze

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Exterro

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Galloway, Johnson, Tompkins, Burr & Smith

Hilgers Graben PLLC

King & Spalding

Latitude

Mayer Brown

Nelson Mullins

Robert Half Legal

Saul Ewing Arnstein & Lehr LLP

Wargo French

#### Miami-Dade Progressive Dinner

Saul Ewing Arnstein

& Lehr (Premier Sponsor)

Foley & Lardner (Dinner Sponsor)

Jackson Lewis (Dessert Sponsor)

#### Member Appreciation Event

Akerman

#### Holiday Party

DLA Piper (Miami)

Barnes & Thornburg (Palm Beach)

#### General Counsel/CLO Dinner

FTI Consulting

Shook, Hardy & Bacon, LLP

#### Coffee Talk CLE

Fisher & Phillips LLP

Gunster

Rumberger, Kirk & Caldwell

White & Case LLP

#### Chief Legal Officer Roundtable

Galloway, Johnson, Tompkins, Burr & Smith

#### Sports Outing & CLE Program

Cozen O'Connor

#### Newsletter Articles

CobbleStone Software

Pavese Law Firm

Barnes & Thornburg

Latitude

Hilgers Graben PLLC



## Chapter Leadership

### President

#### Aline Drucker

General Counsel, Invicta Watch Group

### Immediate Past President/CLE Conference Co-Chair/Secretary

#### Jessica Rivera

Executive Vice President, People & Performance /  
Chief Legal Officer

### President-Elect

#### Justin Carlson

CLO / General Counsel, Velocity Solutions, LLC

### Treasurer

#### Warren Stamm

General Counsel, Niido

### Sponsorship Co-Chairs

#### Lucas Kurtz

Vice President of Legal Affairs  
United States Sugar Corporation

### Christopher Aird

Assistant General Counsel, MasTec, Inc.

### Communications Chair

#### Sharaine Sibblies

Deputy General Counsel, Southeast Toyota  
Distributors, LLC

### Community Outreach Co-Chairs

#### Alex Perez

Senior Legal Counsel, Assurant

#### Nikki Setnor

Managing Senior Counsel, ADP Total Source Inc

### CLE Conference Chair

#### Carlos Cardelle

Senior Counsel, ADP Total Source Inc

### Membership Chair

#### Matthew Cowan

General Counsel, Coastal Waste & Recycling, Inc.

#### Maritza Gomez

Senior Counsel, Employment, Gap, Inc.

### Executive Director

#### Christina Kim

Christina Kim  
Executive Director

## Executive Director Note

### Dear Members,

As 2022 draws to a close, I have a deep sense of gratitude for this organization and our members. We weathered over two years of this pandemic/kinda-post-pandemic world and have been through a lot together. Throughout the year, many of you have come up to me during events to express how good it is to be back in person, to have that peer-to-peer connection, and feel a part of a community again. Community – that is at the core of what makes ACC so great, and we look forward to more opportunities to build that community with our members in 2023.



Christina + Family in the Maldives celebrating Thanksgiving

Our Board of Directors community has grown with two members, Chris Aird and Maritza Gomez – both who are fantastic additions to our leadership and are already hitting the ground running with ideas for the upcoming year.

Sponsors play an important role in our community and we thank them for their partnership, knowledge, and generosity throughout the year.

Thank you for a wonderful 2022. I wish everyone a healthy and joyous holiday season and many blessings in 2023.

Sincerely,

**Christina Y. Kim**

Executive Director, ACC South Florida