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Today's Speakers



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AdTech Litigation – Technologies

- Technologies that can give rise to ad tech litigation when used without explicit advance consent
 - Meta, TikTok, Snap, and/or X pixels
 - Conversion APIs such as Facebook Conversion API
 - LinkedIn ads cookies
 - Google ad cookies
 - Bing ad cookies
 - Session replay software
 - Lead generation software
 - Third party chat software

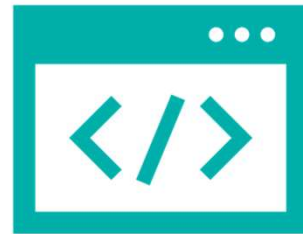


AdTech Litigation – Cookies

- A cookie is a small data file stored on an individual's device through their browser
- Cookies can be set through websites and mobile applications
- Cookies may be first-party or third-party
- Third-party cookies present a legal risk if not properly deployed and disclosed
- Cookies can be blocked by the user
- Cookies can be session or persistent
- Cookies can be used for a variety of purposes, including website functionality (e.g., security), remembering preferences, marketing, and advertising

AdTech Litigation – Pixels

- A pixel is a small piece of code that is embedded in a webpage, email, or advertisement to collect information about user behavior / interactions
- Pixels are always third-party, hosted on third-party servers
- Pixels are not as easy to detect or block by users, presenting thornier legal issues
- Pixels are generally used to track conversion rates, performance, and to engage in targeted advertising
- Meta and TikTok pixels are the focus of plaintiffs



AdTech Litigation – SDKs

- SDK stands for a software development kit
- An SDK is a set of software-building tools for a particular platform, including building blocks, debuggers, and a group of code libraries. SDKs are often used when building mobile applications
- SDKs can include testing and analytical tools that provide insight into how the application performs in production environments. These may be third-party tools.
- SDKs can be difficult to block through third-party customer tools as their analytics tools are often pervasive and widespread

AdTech – Federal Guidance and Enforcement

- Increasingly focused on businesses that use and deploy third-party tracking technologies
- The FTC historically held companies to account for making false or deceptive promises in their privacy statements relating to the use of tracking technologies.
- In March 2023, the FTC issued a blog post that warned organizations using tracking pixels to ensure appropriate disclosures and consents in place
- FTC is also focused on regulating “dark patterns” (i.e., the intentional misleading of a consumer to make a particular choice)
- What will the new administration do?

AdTech Litigation – Wiretapping

- Wiretapping claims under California Invasion of Privacy Act section 631
 - Statutory damages of \$5,000 for each violation for “intercepting” and “communication” “while in transit”
 - Usually under an aiding and abetting theory
 - Hundreds of putative class actions and arbitrations filed in recent years



AdTech Litigation – Trap and Trace

- “Trap and trace” claims under the California Invasion of Privacy Act section 638.51
 - *Greenley v. Kochava* (S.D. Cal.): law is “vague and inclusive as to the form of the collection tool – ‘a device or process’” and held that “courts should focus less on the form of the data collector and more on the result,” and concluded that “software that identifies consumers, gathers data, and correlates that data through unique ‘fingerprinting’ is a process that falls within CIPA’s pen register definition.”
 - Trap and trace claims related to data brokers and SDKs on the rise

AdTech Litigation – On Demand Video Content

- Video Privacy Protection Act of 1988 (federal)
 - 18 USC § 2710 et seq
 - Creates potential liability for any **video tape service provider** who **knowingly discloses**, to any person, **personally identifiable information** concerning any consumer of such provider shall be liable to the aggrieved person
 - Protects “generally a consumer’s substantive privacy interest in his or her video-viewing history.” *Eisenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017)
 - Statutory damages of up to \$2,500 per violation, also punitive damages and attorneys’ fees

AdTech Litigation – Assess and Mitigate

- Risk assessment and mitigation
 - Assess and inventory third-party cookies and ad tech running on website, including when the tech fires and what is being shared with third parties
 - Disable tech not in active use for campaigns, etc.
 - Update privacy policy
 - Consider implementing a consent banner that collects explicit consent before tech fires, included link to T&Cs and privacy policy
 - Consider mandatory arb clause and class action waiver in T&Cs—but beware the mass arb approach
 - High risk sectors include retail and healthcare

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“Greenwashing” Litigation

- Increase in environmentally responsible labeled products led to the rise of false advertising lawsuits (“greenwashing” litigation), alleging these claims about “sustainable” products are false or inflated
- FTC announced it would undergo review of its Green Guides in late 2022
- AG Bonta is currently seeking to make six “big oil” corporations — including ExxonMobil, Shell, Chevron, ConocoPhillips, BP, and the American Petroleum Institute — give up “illegally obtained profits” earned through deceptive greenwashing practices



“Greenwashing” Litigation

- Private class action lawsuits
 - E.g., *Smith v. Keurig Green Mountain, Inc.*, 2023 WL 2250264 (N.D. Cal. Feb. 27, 2023): California Unfair Competition Law claims filed against Keurig for their alleged false advertising of K-cup coffee pods as recyclable
 - Settled for approximately \$10 million, as the company’s statements concerning specific products were alleged to be inaccurate with respect to recyclability



“Greenwashing” Litigation

- Risk assessment and mitigation
 - Assess compliance with the FTC Green Guides and monitor for updates
 - Keep environmental representations simple and specific
 - Qualify environmental marketing claims where possible
 - Assess whether use of colors, words, or images could be interpreted as an implied environmental claim.
 - Track and retain statistics and data necessary to defend your environmental claims
 - Consider mandatory arb clause and class action waiver in T&Cs—but beware the mass arb approach
 - Be accurate!



False and Misleading Pricing Litigation

- Strikethrough/MSRP pricing
- Comparison pricing
- Perpetual sales
- Dynamic algorithmic pricing
- Drip pricing and junk fees
 - SB 478 amended the CLRA to prohibit “advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges”
 - Restitution, actual damage, injunctive relief, punitive damages, and attorney’s fees available

False and Misleading Pricing Litigation

- The FTC Act
 - Broad consumer protection act used to enforce consumer privacy rights/ prevent unfair competition, seek monetary redress for consumers
 - No private right of action, used only by the FTC
 - Typically allege unfairness, failure to disclose, and/or misrepresentations in violation of 15 U.S.C. section 45
 - FTC requires that any reference price advertised by a retailer be the "actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time"
 - Although the FTC does not define "reasonably substantial," some states have more specific requirements, often — but not always — requiring that the reference price be offered to consumers at least 28 days in any 90-day period

False and Misleading Pricing Litigation

- Private enforcement via class actions and mass arbitrations
 - CA Consumer Legal Remedies Act (CLRA)
 - CA Unfair Competition law (UCL)
 - CA False Advertising Law (FAL)

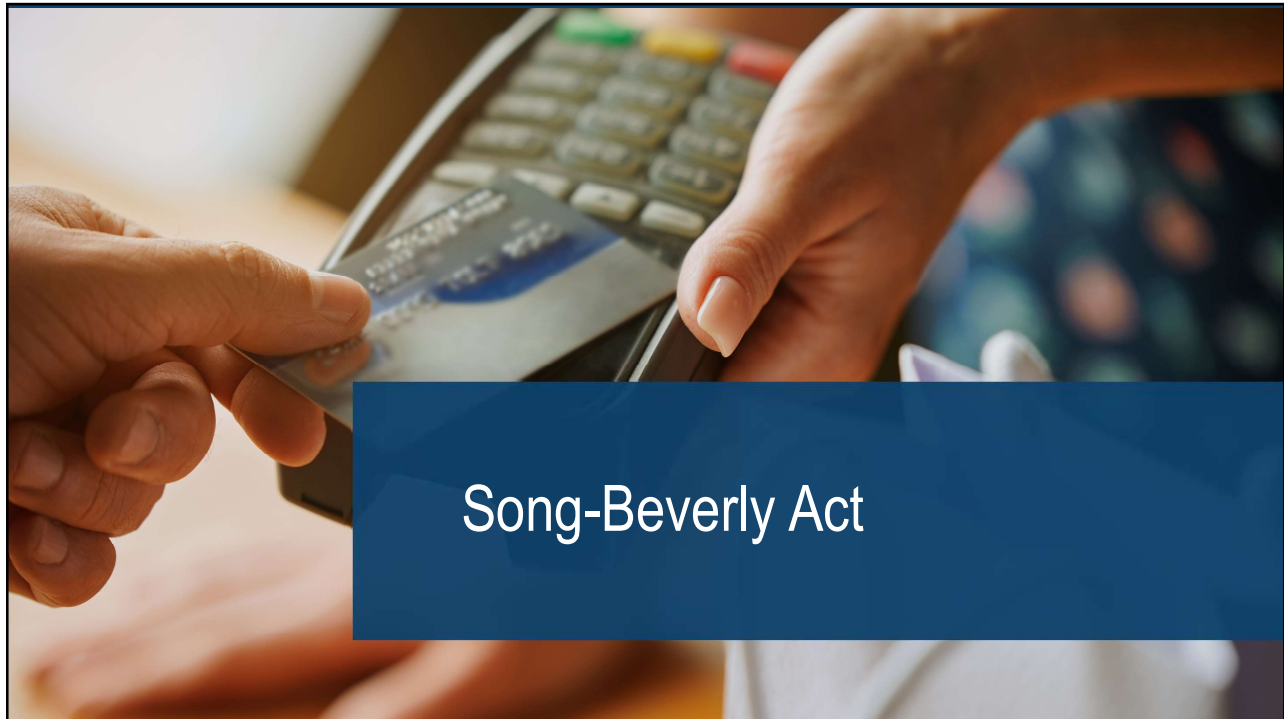


False and Misleading Pricing Litigation

- Exemplar cases:
 - SelectBlinds settled for \$10 million in the Central District of California over allegations that purportedly limited time discounts were actually available on a year-wide basis
 - *Moody v. Hot Topic Inc.* (C.D. Cal.): Advertising “20% Off Sitewide” for more than a year, such that the regular prices listed on its website were never or seldom offered to consumers
 - *Vizcarra v. Michaels Stores Inc.* (N.D. Cal.): offering a discount on a perpetual basis can be misleading even if the reference price is the only one displayed on a given page and consumers have to enter a coupon code

False and Misleading Pricing Litigation

- Risk assessment and mitigation
 - Analyze discounting practices online and in stores
 - Look for MSRP prices and strikethrough prices and analyze whether they have been offered to consumers recently
 - Caution marketing team on danger of “perpetual” or long running sales
 - Avoid advertising that creates false urgency; FTC has specifically found that advertisers engage in dark patterns when “creating pressure to buy immediately by saying the offer is good only for a limited time or that the deal ends soon — but without a deadline or with a meaningless deadline that just resets when reached”
 - Consider mandatory arb clause and class action waiver in T&Cs (discussed later)



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California's Lemon Law Act

- What's wrong with these pictures?

Welcome, let's get your product registered

A few easy steps is all it takes
Register your product to activate your warranty and gain access to exclusive product features, special offers and more, in just a few simple steps.

Please provide a little information

Serial Number *

14 OR 18 CHARACTERS

Where can I find my serial number?

How do you plan to use your product? *

Choose one:

Do you have a Nuance ID? *

☐ Yes ☐ No I do not know

Continue

Sleep Specialists on call @ 800.486.1000

Mattresses Bundles Pillows Furniture Bedding Accessories Explore Sale

Casper Product Registration

Register your product to activate your warranty.

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California's Song-Beverly Warranty Act (Cal. Civ. Code, § 1790 *et seq.*) states that "[n]o warranty or product registration card or form, or an electronic online warranty or product registration form, may be labeled as a warranty registration or a warranty confirmation." (Cal. Civ. Code §1793.1(b))

■ Class Actions

- Plaintiffs claim that they purchased products based on advertisements touting warranty, and upon purchase of the products, they found a card with the product that directed them to "activate their warranty" either by submitting the card by mail or registering online
- Plaintiffs allege that they assumed that if they did not register their purchased products, the associated warranty would not be activated
- The Act includes provision for award of attorney's fees
- Do not tie registration to activation of warranty in any way – consider including statement: "Failure to register your product purchase will not diminish your warranty rights"



New Label Requirements

- Short-form warnings will require at least one chemical name
 - Businesses currently using the short-form warnings will have until 2028 to implement the new warnings
- New warnings required for passenger and off-highway motor vehicle parts and recreational marine vessel parts exposures
- Businesses can now choose to continue to use the signal word, “WARNING:” or the words “CA WARNING” or “CALIFORNIA WARNING”
 - This language would be preceded by the universal warning symbol depicted by a yellow triangular warning icon featuring a black exclamation point
- <https://oehha.ca.gov/proposition-65/proposition-65-list>



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PFAS

- AB 347, amends existing PFAS law to provide enforcement mechanisms for PFAS bans and labeling requirements as applied to “covered products,” including juvenile products, textile articles and food packaging
 - AB 347 will require all manufacturers of covered products to by July 1, 2029, register such products, pay a registration fee and provide a statement of compliance reflecting that each covered product is in compliance with the applicable covered PFAS restriction
- AB 2515 prohibits companies from manufacturing, selling, or distributing menstrual products that contain regulated PFAS
 - “Regulated PFAS” means PFAS “intentionally added to a product” as of January 1, 2025, and will mean “PFAS in a product at or above a limit determined by the department” beginning January 1, 2027

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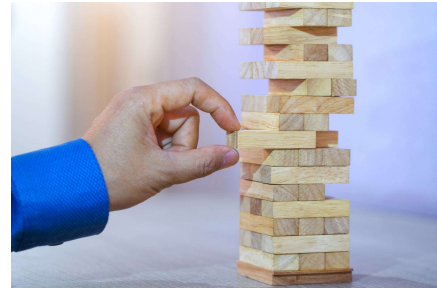
California Civil Code Section 1670.8

- Prohibits businesses from using non-disparagement clauses in contracts for the sale or lease of consumer goods or services
 - Passed to prevent companies from seeking retribution against customers for posting negative reviews
- Recent Spate of Class Action Lawsuits focused on website Terms and Conditions
 - Plaintiffs claim that Terms are a Contract
 - Plaintiffs focus on *any* language in Terms suggesting waiver of rights *e.g.* language that bars content that is illegal or discriminates against individuals and classes of individuals or language related to copyright violations and claim that such language coupled with websites ability to suspend, deactivate or terminate access is a violation of 1670.8
- While Plaintiffs' interpretations of Section 1670.8 appear dubious we are waiting for a CA appellate court to provide clarity
- Companies (esp. those selling or leasing consumer goods or services) should review their online service's terms of use to assess any potential risk *i.e.* any provisions that could be construed as restricting consumers' right to speak about the company or the goods and services offered through the applicable online service



Risk Mitigation

- Know Your Vendors and Service Providers
 - Are you appropriately allocating risk?
 - Do you know what they are doing on your behalf?
 - Respond quickly in case of potential disputes
- Understand the Regulatory Landscape
 - Governmental investigations often lay the groundwork for follow-on litigation



Risk Mitigation

- Coordinate Regular Meetings with Business Units
 - Understand their goals and strategies
 - Proactively communicate potential risks and ways to mitigate that risk
- Identify Business Areas Most Likely to Trigger Disputes
 - Provide training on areas of inherent risk to your Company or Company dynamics
 - Data privacy
 - Cybersecurity
 - Sales Calls
 - Marketing

Litigation Strategies

- Early Case Assessment
- Procedural Tricks and Tactics
 - Jurisdictional challenges
 - Venue/Forum challenges
 - Arbitration
 - Class Action Waivers
 - MDL



Litigation Strategies

- Consider mandatory arb clause and class action waiver in T&Cs—but beware the mass arb approach
 - Plaintiffs' firms can gather dozens or hundreds of claimants
 - JAMS and AAA consumer rules require that the business pay nearly all administrative costs
 - JAMS and AAA mass arbitration rules are now available, but do not kick in until 25 and 75 claimants respectively
- If you determine that arbitration is nonetheless favorable, ensure that your clause is enforceable

Litigation Strategies

- Exploration of Early Settlement/Mediation Where Appropriate
 - Control the Narrative
 - Provide documents and information on your terms
- Closely align with the Business
- In Repeatable Cases, Closely Consider Consequences of Taking Certain Positions
- Class Settlements
 - Claims made settlements
 - Giving Plaintiffs' counsel "credit" for a business practice change



Organization of Other In-House Litigation Teams

- Organization around subject matters
 - Areas of frequent litigation
- Organization around materiality thresholds
 - Class/Individual
 - Individual Cases Can Be “Trial Balloons”
 - Enforcement/Regulatory
- Organization around geography

Consistency of Counsel

- RFPs/Preferred Counsel Lists
 - More visibility into potential legal spend
 - Create a “bench” of go-to counsel who are subject matter experts and understand your business
 - Institutional knowledge
 - Avoids “one off” engagements
- In Repeatable Events, Consistency of the Legal Team
 - National Coordinating Counsel
 - Pre-Approval of Team
 - Associates/paralegals

Discovery Processes/Procedures

- Litigation Hold Process Accessible and Repeatable
- Witness Interviews
- ESI Collection, Review, and Production
 - “Data Library”
- Consider Impact of AI
- Identification of Principal 30(b)(6) Witnesses/Declarants in Repeatable Litigation
- Preparation and Production of Fact Witnesses for Depositions

Other Best Practices

- Secure E-Mail for PII
- Shared Document Platforms/Access to Law Firm’s System
- Creation of Resource Library
- Return/Destruction of Confidential Information
- Maintain historical information on types of claims, settlements and identify frequent filers

Thank you for attending!



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