KEY LITIGATION TRENDS AND RISK MITIGATION

Strategies for 2025

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Agenda

- Key litigation dispute areas in 2025

- Class action trends

- Regulatory and enforcement developments impacting businesses

- Practical steps for mitigating litigation risks before they arise

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Key Litigation / Dispute Areas

- Cybersecurity and data privacy
  - Increase in cyberattacks
  - Growing disclosure burdens and uncertainty around Artificial Intelligence (AI) tools
  - Patchwork of data privacy laws in the U.S.
  - Increased regulatory scrutiny and aggressive plaintiff attorneys
- Employment and labor
  - Consistently remains a concern
  - More discussion in Session #3 (June 18)
- Intellectual Property
  - Patents disputes and trolls
  - Protecting innovations often seen as key to success for companies

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Class Action Trends: Privacy and Online Technologies

- Last few years courts have seen influx of putative class action lawsuits targeting businesses with websites that utilize technology to track users' website interactions

- Many lawsuits filed in California are under California Invasion of Privacy Act (CIPA), Cal. Penal Code sections 630 – 638.55

- Types of technologies at issue:
  - Chatbots
  - Session Replay: mouse movements, clicks, typing, browsing
  - Cookies/Pixels: MetaPixel, Google Pixel, Google Analytics
  - Privacy of video-viewing behavior: Video Privacy Protection Act (VPPA)
  - Search bar claims

Class Action Trends: Privacy and Online Technologies

- CCPA claims permitted to proceed despite no data breach:
  - *M.G. v. Therapymatch, Inc.*, No. 23-CV-04422-AMO, 2024 WL 4219992, at *7 (N.D. Cal. Sept. 16, 2024), recognizing that courts have let CCPA claims survive a motion to dismiss where a plaintiff alleges that defendants disclosed plaintiff's personal information without consent due to the business's failure to maintain reasonable security practices
  - *In re BetterHelp, Inc. Data Disclosure Cases*, No. 23-CV-01033-RS, 2024 WL 3416511, at *2 (N.D. Cal. July 15, 2024)
- Geolocation tracking lawsuits:
  - Google, Kochava, Weather Channel
  - Selling and collecting location data without consent that can be used to identify people visiting sensitive locations, which could lead to discrimination, stalking, and violence
- Mass arbitration trends

Privacy Class Actions: Mitigation

- **Review privacy policies** to ensure transparency regarding data collection practices and third-party data sharing
- Consider **modifying arbitration clauses** to include mandatory mediation clauses, class action waivers, batching, bellwethers
- **Audit websites** to understand use of tracking technologies
- Consider whether **consent** is required
- **Stay up-to-date** on case law developments and regulatory changes that may impact data collection on websites
  - What impact do these things have on CIPA litigation?

Class Action Trends: AI-related Securities Exposure

- Risks:
  - AI "washing" - overstating AI capabilities to boost stock prices or market position
    - Risk of misleading investors under Rule 10b-5
    - Examples:
      - GitLab- Complaint alleges company and its officers made false and misleading statements about its ability to develop AI tools for the DevSecOps platform, leading to a significant stock price decline
      - AppLovin- Complaint alleges that the company exaggerated the effectiveness of its AXON 2.0 digital ad platform and its use of "cutting-edge AI technologies"
  - Underreporting AI-related Risks - failing to disclose material operational, compliance, or ethical risks associated with AI use
    - Can trigger omissions claims under Reg S-K Item 105 (Risk Factors)
    - Examples:
      - The Trade Desk - complaint alleged company failed to disclose significant challenges in rolling out its AI-based forecasting tool, Kokai, leading to revenue shortfalls and a significant stock price decline
      - Telus International - complaint alleges company failed to disclose its shift to AI-based services would cannibalize higher-margin legacy offerings, leading to revenue declines

Class Action Trends: AI-related Securities Exposure

- Risks (Continued):
  - SEC enforcement actions
    - Delphia (USA) Inc. and Global Predictions Inc.: involved allegations of false and misleading statements in SEC filings, press releases, and in marketing regarding purported use of AI and machine learning that incorporated client data in its investment process
    - Rimar: alleged company made false and misleading statements about its purported use of AI to perform automated trading for client accounts
- Common Exposure Points:
  - Misstatements in 10-K, 10-Q, earnings calls
  - Inconsistent messaging between SEC filings and investor decks or marketing
  - Overly optimistic product claims or roadmaps

Class Action Trends: Mitigating AI-related Securities Exposure

- Cross-Functional Disclosure Controls

- AI-Specific Risk Disclosures

- Consistency in Communication

- Monitor Peers & Regulators

Class Action Trends: AI Marketing & Misrepresentation Litigation Risk Exposure

- Risks
  - Exaggerated/misleading claims- powered by AI, autonomous, real-time insights, etc. without substantiation
  - Failure to disclose material limitations or risks (chatbots, omitting limitations on accuracy/reliability)
  - Overreliance/misrepresentation of use of third party AI
- Claims
  - Consumer class actions under deceptive practices
  - FTC enforcement actions under 2023 AI marketing guidelines
  - Lanham act claims by competitors
  - NAD inquiries/challenges to marketing copy
- Examples
  - FTC warning letters to health tech firms marketing unvalidated AI diagnostic tools

Class Action Trends: Mitigation - Vetting AI Marketing & Product Claims

- Align legal and marketing early- pre-launch reviews, vetting new AI features before launch

- Substantiate or qualify language

- Review for consistency across marketing copy, sales and support teams

- Monitor- evolving regulation, enforcement actions, benchmark claims and disclaimers

Other Class Action Trends & Concerns

- Overall uptick in litigation and class actions?
  - "Made in USA" labeling suits
  - Privacy lawsuits generally
- Increasingly complex environment?
  - Artificial Intelligence (AI) regulation, development and integration
  - Global businesses

Regulator Activity and Investigations: Overview

- General increase in regulator activity in 2024

- Uncertainty in current administration, makes planning difficult in 2025

  – Slow down in interactions with government regulators (at federal level?)

  – State enforcement of consumer privacy still a hot topic

- Rapid changes in Privacy and AI in U.S. and globally

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Recent Regulator Activity & Enforcement: Privacy

- Consumer complaints drive investigations and enforcement actions
- New state privacy laws have overlap, but there are unique provisions which are being enforced
- If a regulator reaches out, be proactive and cooperative
  - The California Privacy Protection Agency issued Order of Decision against American Honda Motor Co.
- Use the resources available to companies:
  - Many states have utilized implementation regulations, FAQs, compliance guidance, enforcement reports or enforcement actions
- State regulators are collaborating to enforce laws
  - Formal consortium announced between CA, CO, CT, DE, IN, NJ, and OR

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Artificial Intelligence

- AI use has become pervasive
- Privacy risks, include:
  - Unauthorized use of personal data to train AI models
  - AI systems affected by bias in its processing or outputting
  - Deceptive marketing of AI products or services, such as exaggerations about capabilities or failure to disclose risks
- Where use of AI already matters
  - Initial decisions out of Europe indicate that users of an AI product may be primarily liable to their contractual partners, even if they did not develop the AI product themselves
  - Use of data to train AI models is evidence that a third party is a distinct eavesdropper, and not a "tape recorder" under the CIPA

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Tips for Mitigation of Litigation Risks

- Develop and launch internal Data and AI Committees
  - Cross-functional
  - Regular meetings to review risks and updates
  - Responsible for developing and managing integration of AI into products
- Conduct audits of contract provisions
- Budget/plan early for potential litigation
- Education: find ways to stay on top of current trends
  - Internal reporting to teams on enforcement trends and litigation (the Wet Blanket Committee)
  - Be a proactive partner with internal teams
- Collaborate and work with departments to evaluate company processes, forms
  - Develop employment forms
  - Have a process in place severances

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Thank you!

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