

Morgan Lewis

TECHNOLOGY MARATHON

**Developments Privacy Law Trends: A Look
at BIPA and Wiretapping Litigation**

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Schireson, and Ben Kabe

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Presenters



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The Illinois Biometric Information Privacy Act

Legal Developments and Best Practices to Mitigate Risk

Beth Herrington & Ben Kabe

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Introduction

- What is the Biometric Information Privacy Act (BIPA)?
- Biometric Identifiers and Biometric Information
- Requirements – Storage, Collection, Profit, Dissemination, Protection
- Standing – “Aggrieved Person”



Legal Developments – Illinois Supreme Court

- *Cothron v. White Castle* – “Per Scan” and Discretionary Damages
- *Tims v. Black Horse Carriers* – Statute of Limitations



Legal Developments – Other Important Decisions

- *Zellmer v. Facebook* – Consent from Non-users
- *Vance v. Amazon/Microsoft* – Extraterritoriality
- *Barnett v. Apple Inc.* – Possession and Collection



Ensuring Compliance – Section 15(a)

- Timing – Before Possession (*Mora v. J&M Plating Inc.*)
- Publicly Available
 - Destruction and retention
 - Destroy “when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first”
- If there is a question on possession, publish a policy



Ensuring Compliance – Section 15(b)

- Limited case law on the substance of notice and consent documents
- Requirements: (1) inform that biometrics are being collected; (2) purpose and length of term; and (3) receive *written* consent
- Vendors – contractual obligations (*Beelman Trucking; Ronquillo*)



Litigation Strategy – Responsive Pleading

- Removal Considerations
 - Federal case law
 - Split cases
- Early Summary Judgment
 - Courts tend to permit discovery
 - Key documents



Litigation Strategy – Discovery & Experts

- Fact Discovery
 - Consider producing documents under Rule 33(d) to explain technology
 - Elicit deposition testimony about harm, consent, and knowledge
- Experts
 - Pay attention to data chain of custody
 - Explain the data at issue with plain language, analogies, graphics



Wiretap Class Actions

Legal Developments and Best Practices to Mitigate Risk

Kate Deal, Catherine Hounfodji, and Terese Schireson

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Introduction to Wiretapping

- Wiretap acts prohibit interception of communications without consent
- Originally created to address surreptitious recording of phone calls or use of eavesdropping devices
 - Updated to address electronic communications (e.g., emails)
- One-party consent v. Two-party / Multi-party consent
- Laws driving the most recent wave of litigation
 - California Invasion of Privacy Act (CIPA)
 - Florida Security of Communications Act (FSCA)
 - Pennsylvania's Wiretapping and Electronic Surveillance Control Act (WESCA)

Wiretap Class Actions – Background

- Recent wave of class actions allege “wiretapping” through:
 - **Session replay technology:** tracks user activity on websites, such as keystrokes and mouse movements, to study how consumers interact with the website
 - **Chatbot:** conversations between consumers and “virtual assistant” via instant message on website
 - **Tracking Pixel:** small files used by Facebook and others as another means of collecting information about how users interact with a website



Wiretap Class Actions – Background

- Plaintiffs are focused on “all-party consent” states, primarily CA, PA, and FL
- Lawsuits target both website operators and digital marketers
 - Not seeing many pull in the third-party vendors that website operators engage
- Steep potential penalties ranging from \$1,000 to \$10,000 per violation

Wiretap Class Actions – Elements of Claims

- California Invasion of Privacy Act (CIPA)
 - Prohibits any person from using **electronic means** to learn the **contents** or **meaning** of any **communication** without **consent** or in an **unauthorized manner**
- Florida Security of Communications Act (FSCA)
 - Prohibits the **interception, attempt to intercept, or procurement of another to intercept or attempt to intercept** any **wire, oral, or electronic communication**.
- Pennsylvania's Wiretapping and Electronic Surveillance Control Act (WESCA)
 - Prohibits any person from intercepting, disclosing, or using, or procuring any other person to to **intercept, disclose or use, a wire, electronic or oral communication** without **consent**

Wiretap Class Actions – Where Did This Come From?

- **California:** *Javier v. Assurance IQ*, 2022 WL 1744107 (9th Cir. 2022)
 - 9th Circuit reversed District Court’s grant of MTD and remanded for consideration of whether, based on allegations, plaintiff consented to use of session replay.
- **Pennsylvania:** *Popa v. Harriet Carter Gifts*, 45 F.4th 687 (3d Cir. 2022)
 - 3rd Circuit took expansive view of PA wiretap statute’s reach in reversing district court’s grant of SJ, rejecting direct-party exception and place-of-interception arguments.
- **Florida:** *Goldstein v. Costco Wholesale*, 559 F. Supp. 3d 1318 (S.D. Fl. 2021)
 - District Court granted motion to dismiss because no substantive communications captured; analogizing session replay technology to surveillance video at a store.
 - But see: *Makkinje v. Extra Space Storage*, 2022 WL 80437 (M.D. Fl. 2022) (denying motion to dismiss in chatbot case and distinguishing chat feature from session replay based on type of communications recorded)

Wiretap Class Actions – Hurdles to Class Certification

- The issues are too individualized
 - Whether website users consented
 - What types of “communications” were intercepted and whether those constitute “communications” under wiretap acts
 - Whether website users can be identified by website operators
 - Whether website users suffered any harm

Wiretap Class Actions – Arguments and Defenses

- Enforcement of arbitration clause
- Consent through privacy policy disclosures, buy-flow process, or otherwise
- Use of session replay or chatbot technology does not fit statutory language, e.g., no “interception” of “communications”
- Direct party exception

Wiretap Class Actions – Current Trends

- A handful of plaintiffs' firms are driving the train.
- One firm alone sent many hundreds of demand letters to e-commerce sites that operate in California – and filed dozens of lawsuits
- **California:**
 - Recent decisions holding vendors providing data analysis tools not “eavesdroppers”
- **Pennsylvania:**
 - Recent decisions allowing discovery on elements of wiretap claim
- **Florida:**
 - Trend toward granting MTDs on session replay claims and denying MTDs on chatbot claims

Wiretap Class Actions – Current Trends

- Recent surge in allegations that hospitals and health insurers improperly share health information through Meta Pixel on their websites, including information submitted through patient portals.
 - Some plaintiffs allege they were shown targeted ads related to health conditions on Facebook after visiting healthcare providers' websites.
 - One complaint alleges that over 600 hospital websites have sent patient data to Facebook.
- Litigation is likely driven by recent study by The Markup claiming that one third of the country's largest hospitals share patient data with Meta/Facebook.
- Much of this litigation is being brought under the Massachusetts Wiretap Act
 - Over a dozen cases currently in pleadings stage in Massachusetts state courts.

Wiretap Class Actions – Takeaways

- Check your disclosures
 - **Privacy Policy**
 - Does it include a reference to online chats / session replay / tracking pixel as a source of collection?
 - Does it accurately reflect the uses and disclosures of the information collected?
 - Is it linked in the buy-flow process?
 - **Online Chat**
 - Whether a chatbot or live chat, is there a disclosure that:
 1. Informs the consumer that the chat will be recorded and/or personal information will be collected?
 2. Is located above / prior to the fields that collect the personal information?
 3. Links to the Privacy Policy and Terms (particularly if there's an arbitration clause)?
- Check your vendor contracts
 - Know whether you have indemnification clauses that could be invoked

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Elizabeth (“Beth”) Herrington focuses her practice on complex commercial and class action litigation across the United States, including management of multi-jurisdictional related investigations and litigation. Many challenges facing companies today present multiple dimensions and Beth works with companies to shape overall strategy to successfully navigate these challenges. Beth regularly represents domestic and international retail/eCommerce companies, technology and mobility companies, consumer service providers, and product manufacturers in high-exposure investigations and lawsuits that involve fraud, privacy claims, tax, and trade secret theft.

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Kathryn Deal, a former federal prosecutor, defends clients at trial and in aggregate litigation, including class actions, mass actions and arbitrations, mass torts, multidistrict litigation, and parallel government proceedings throughout the United States. Over the past two decades, Kate has secured trial and arbitration wins for Fortune 100 clients in complex disputes; managed and favorably resolved portfolios of putative class, mass, and government proceedings; and investigated and prosecuted a variety of economic crimes and complex frauds. As a partner to clients facing aggregate litigation exposure, Kate has obtained early litigation victories through efficient investigation, strategic motion practice, and a practical and proactive approach to risk mitigation and compliance.

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Catherine North Hounfodji regularly counsels and defends clients in matters relating to privacy, cybersecurity, class actions, state consumer privacy laws such as the California Consumer Privacy Act, consumer protection laws, retail operations, loyalty and gift card programs, unclaimed property, and commercial disputes. Catherine led a multi-team, multi-year effort for a major retail client to track and analyze COVID-19 restrictions across the United States. Catherine has more than a decade of experience litigating commercial disputes and defending against wage and hour, healthcare, and tort claims.

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Terese M. Schireson represents clients in diverse areas, including privacy and cybersecurity, class action litigation, and complex commercial disputes, in state and federal courts across the country. She primarily counsels and defends clients in matters relating to compliance with new consumer privacy laws, data security incident response, and any related litigation or government investigations. Terese also defends companies in litigation involving breach of contract, unfair competition, fraud, and consumer protection claims and advises consumer-facing clients on legal, regulatory, and operational matters. She serves clients across diverse industries, including the retail, energy, technology, and healthcare sectors. Terese is a member of the firm's global privacy and cybersecurity practice as well as its Class Action Working Group.

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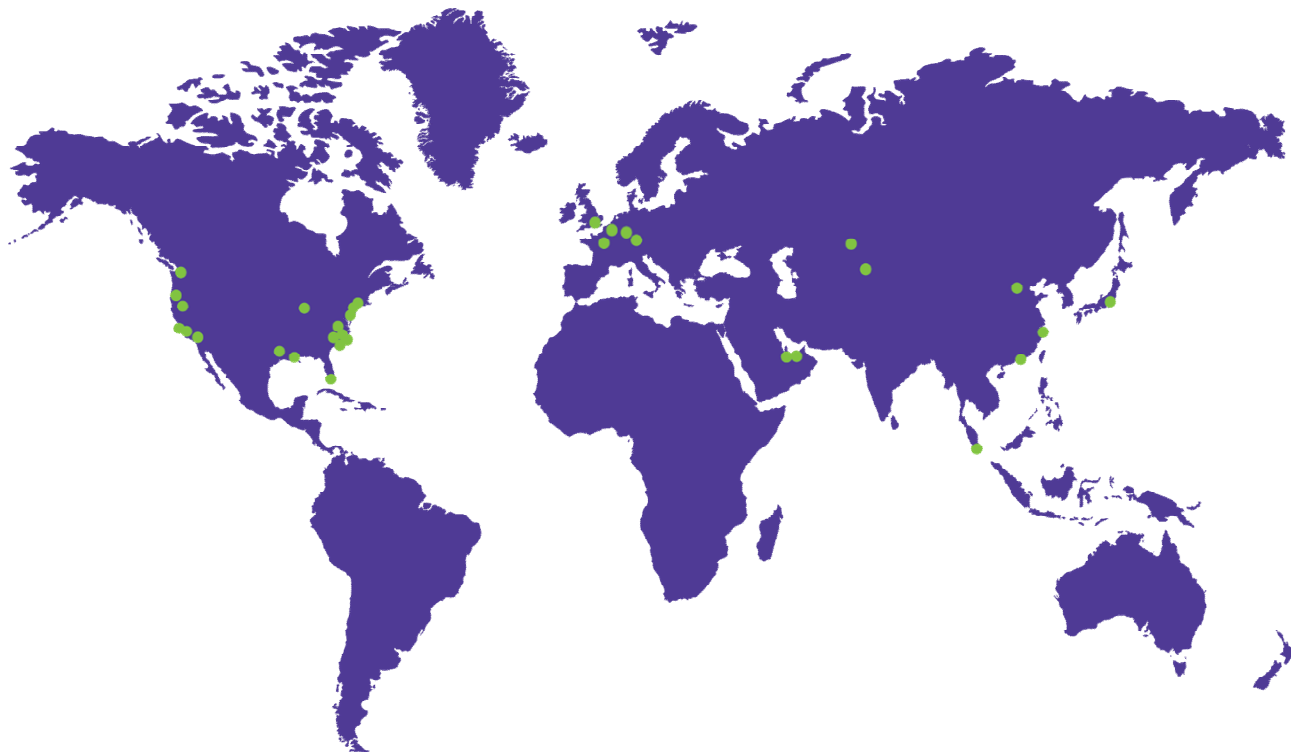
Benjamin Kabe represents clients across various industries in complex civil litigation and has experience in privacy and cybersecurity, government investigations, and class action defense. Ben has advised leading technology companies in class action litigation under the Illinois Biometric Information Privacy Act. He also maintains an active pro bono practice, representing prisoners asserting civil rights claims and assisting nonprofit organizations. Ben serves on the Planning Group for Morgan Lewis's firmwide Class Action Working Group. While in law school, Ben was an editor of the Northwestern Journal of Law and Social Policy, served as a judicial extern for Judge Sharon Johnson Coleman of the US District Court for the Northern District of Illinois, and was awarded Northwestern's Senior Research Honors for his article on judicial review.

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