

# OUR PRACTICE

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## Privacy Litigation

**Our national Privacy Litigation Team understands that privacy litigation is not a one-size-fits-all challenge. Clients rely on our deep bench of aggressive, yet measured, litigators for exemplary outcomes when they need it most, making our team a go-to for their most sensitive privacy matters.**

### Why Baker Donelson?

**Comprehensive Privacy Litigation Experience:** We regularly represent clients in the full spectrum of privacy disputes in federal and state courts across the country, in addition to deep experience with international privacy laws, common law, and constitutional privacy claims. Our attorneys are equally adept at resolving high-profile class actions and efficiently managing individual privacy disputes that can set important precedents or escalate into larger exposures.

**Sophisticated Technical and Legal Subject Matter Understanding:** Our sophisticated understanding of the technologies, data flows, and business practices allows us to translate complex technical issues into compelling legal arguments. We are well-versed in the myriad of emerging, advanced technologies and solutions used in commercial operations, with a deep understanding of the nuances and intricacies of associated processing activities, transfers, and data flows.

**Thought Leadership and Industry Insights:** We stay ahead of the curve by monitoring and regularly updating our clients on the legislative, regulatory, and judicial developments shaping the privacy landscape. We are frequently sought out for speaking engagements and publish extensively in major legal and industry trade publications, including *Bloomberg Law*, *Law360*, *Legaltech News*, and *Pratt's Cybersecurity & Privacy Law Report*. This thought leadership gives our clients a real-world advantage: we anticipate what's next and prepare you for it.

### Areas of Focus

- **Wiretapping:** One of the fastest growing areas of privacy class action litigation concerns challenges to the use of website technologies, including pixels, cookies, web analytics, and web tracking tools, under the Electronic Communications Privacy Act (ECPA), California Invasion of Privacy Act (CIPA), Wiretapping and Electronic Surveillance Control Act (WESCA), and other federal and state wiretapping laws. These lawsuits allege (among other things) that the use of web technologies and tools "intercept" electronic communications without consent in violation of prohibitions on wiretapping and/or the use of "pen registers" and "trap and trace devices." Privacy claims and potential class action litigation related to California residents seeking to exercise their rights under California's "Shine the Light" law have also provided another cause of action from plaintiffs.
- **Video Privacy:** Another active area of privacy class action litigation involves purported violations of the Video Privacy Protection Act (VPPA) and state analogues. The VPPA was enacted in 1998, during the era of brick-and-mortar video rental stores. It bars videotape service providers from knowingly disclosing personal data pertaining to individuals' video-watching histories with third parties. In recent years, hundreds of companies with videos embedded in their sites have been named in class action lawsuits for alleged VPPA violations arising from the use of cookies, tracking pixels, and similar technologies on websites that feature videos, which allegedly share the video-watching behavior on those sites with third parties.

- **Biometrics:** The Illinois Biometric Information Privacy Act (BIPA) has triggered a sustained wave of class action litigation, impacting companies across all industries. BIPA continues to be one of the most significant sources of legal risk and liability for any business that develops, provides, or utilizes biometric technologies. With its stringent requirements and the potential for substantial statutory damages – even in the absence of actual harm – BIPA presents a unique and ongoing challenge for organizations handling biometric data. Companies operating in this space must remain vigilant, as BIPA class actions can arise from even routine uses of biometric data, exposing businesses to high-stakes litigation and reputational risk.
- **Consumer Protection/ Unfair, Deceptive, and Abusive Acts and Practices (UDAAP):** All 50 states have enacted UDAAP laws, which broadly prohibit a wide range of "unfair" and "deceptive" business conduct. While these state laws are generally modeled after Section 5 of the Federal Trade Commission Act (FTC Act), they often impose far greater liability risks for noncompliance than their federal counterpart. For businesses, this means that even routine marketing, sales, or data practices can trigger significant exposure to lawsuits and regulatory actions under state UDAAP statutes. The result is a complex and high-stakes legal environment where companies must be proactive and vigilant to avoid costly litigation and reputational harm.
- **Telemarketing:** The explosion of new communications technologies has fueled a dramatic surge in telemarketing class action litigation, particularly under the Telephone Consumer Protection Act (TCPA). The TCPA governs a broad array of marketing activities – including email and text message campaigns, telephone solicitations, the use of automatic telephone dialing systems (ATDS), prerecorded voice messages, and fax transmissions. In recent years, companies of all sizes have been targeted, with the plaintiffs' class action bar seizing on the TCPA's expansive reach and high statutory penalties. At the same time, states are enacting their own analogous statutes – most notably, Florida's Telephone Solicitation Act – which has sparked a new wave of class actions challenging marketing calls and texts. The result is a rapidly evolving and high-risk legal environment, where businesses must navigate not only federal requirements but also an increasingly complex patchwork of state laws. Staying ahead of these developments is critical to minimizing risk and defending against costly litigation.
- **ADA Litigation:** The Americans with Disabilities Act (ADA) has become a major source of litigation risk for businesses that are increasingly being targeted not only for physical locations but also for digital assets – such as websites and mobile apps. The volume of ADA lawsuits has surged in recent years, often resulting in costly legal fees, injunctive relief, and reputational harm, even for well-intentioned companies. Navigating this evolving landscape requires a sophisticated understanding of both federal and state accessibility requirements. Our team leverages our deep ADA background and practical litigation experience to help clients assess risk, implement effective compliance strategies, and vigorously defend against individual and class action claims – protecting your business while turning accessibility compliance into a competitive advantage.

## Tailored Class Action Defense

Through our team's comprehensive understanding of the intricacies of privacy class actions, our lawyers are adept at formulating innovative, winning litigation strategies that effectively posture privacy class actions for dispositive dismissals or, alternatively, negotiated settlements on terms favorable to our clients.

Our command of the complexities associated with cutting-edge technologies and their associated data flows, the nuances and potential pitfalls of class action procedure and strategy, and the constantly changing nature of the law in this space – combined with the innovative and creative approaches we bring to every dispute – provides our clients with an unmistakable strategic and tactical advantage for the duration of litigation. This

same experience also allows our team to handle these complex disputes in an efficient and cost-effective manner.

### **Strategic, Business-Focused Representation**

We know that privacy litigation – whether individual or class action – can threaten your business's bottom line and reputation. Our approach is aggressive yet pragmatic, always focused on your business objectives. When desired, we develop innovative strategies to position cases for early resolution, minimize disruption, and control costs, while never losing sight of the broader business and regulatory context. At the same time, when our clients' objectives call for it, we are fully prepared to litigate cases aggressively through every stage of the process, leveraging our experience and technical fluency to pursue the most favorable outcomes in court.

### **Track Record of Success in Bet-the-Company Class Action Litigation**

We have a track record of excelling not just in defending privacy class actions, but in achieving decisive victories in these disputes – oftentimes at the very outset of litigation. We have developed a notable track record for definitively defeating privacy class claims at the initial pleading stage of litigation through successful dispositive motion practice. More than that, by leveraging our relationships in this space, we are often able to facilitate outright voluntary dismissals of privacy class actions in their entirety through informal discussions with opposing counsel, and without the need to engage in any type of motion practice. And when necessary, we have the experience and know-how to effectively litigate privacy class actions from start to finish, and in a manner that positions our clients for favorable outcomes, whether through dismissal on summary judgment or individual or class settlements.

### **Beyond Litigation: Proactive Compliance and Risk Management**

Our commitment to clients extends beyond the courtroom. We partner with businesses to build robust privacy compliance programs, manage vendor and third-party risks, and provide strategic guidance on product launches, marketing initiatives, and technology transactions. We help you turn compliance into a competitive advantage – reducing risk, building trust, and enabling growth.

### **Compliance and Transactions**

Outside of the courtroom, our team provides strategic guidance to companies on the full range of issues that arise at the intersection of technology, business, and the law – helping clients avoid being targeted with high-risk, high-exposure suits altogether.

We frequently assist clients in navigating the complexities and nuances of today's growing, global patchwork of privacy laws and regulations, while also managing associated risks. Our approach focuses on providing practical, strategic guidance that not only facilitates ongoing legal compliance, but also leverages compliance as a competitive advantage in the marketplace. We also represent clients in complex transactional matters involving advanced, data-driven technologies and strategic partnerships/relationships implicating the use of personal data.

### **Regulatory Compliance Counseling**

We provide skilled regulatory compliance counseling and guidance on the full range of privacy laws in existence today, as well as on issues associated with the increased scrutiny of commercial data practices by the Federal Trade Commission (FTC), Department of Justice (DOJ), Consumer Financial Protection Bureau (CFPB), and other federal regulatory agencies.

### **Proactive Risk Management and Strategy Development**

We provide companies with strategic advice on how to address and mitigate the growing legal risks and liability exposure that arise when leveraging the benefits of personal data, including class action litigation readiness, clickwraps, data retention and destruction, internal policies and procedures, and employee training. We also

advise on novel and challenging liability risks stemming from unique issues, such as marketing materials and the increasing threat of mass arbitration.

## **Product Counseling**

We counsel companies as they bring new data-powered products and services to the market, and thereafter throughout the duration of the product/data lifecycle. As product counsel, we work closely with business and legal teams in the development and launch of new products and services, and we continue to provide strategic guidance post-launch to facilitate continued, long-term compliance and risk mitigation.

## **Compliance Program Development**

We partner with companies in proactively managing risk through the development of comprehensive, enterprise-wide compliance programs for all types of technologies and all forms of personal data. We also work with companies to strengthen and enhance existing compliance programs through auditing of current organizational data practices; developing remediation plans to address and eliminate compliance gaps; preparing modifications and updates to organizational privacy policies, notices, consents, and other external-facing disclosures pursuant to these remediation plans; and advising on the development and implementation of additional strategic measures to facilitate ongoing legal compliance and manage anticipated risk.

## **Technology Contract Negotiations and Guidance**

We draft and negotiate complex technology agreements that implicate personal data. We also provide guidance and counseling, including benchmarked considerations pertaining to personal data, to companies involved in negotiating technology contracts, as well as advice on existing agreements implicating the same.

## **Vendor and Third-Party Risk Management**

Vendors and other third-party relationships represent one of the most sizeable risk vectors associated with the use of personal data. For example, the first BIPA jury trial – which resulted in a \$220 million damages award – was attributable to just such a relationship. To address these risks, we advise companies on a range of vendor risk management initiatives, including vendor due diligence, as well as contract provisions and negotiation strategies for addressing data rights and indemnity obligations.

## **Representative Matters**

*Results may vary depending on your particular facts and legal circumstances.*

- Defended the world's largest food distributor in a multidistrict class action litigation stemming from a significant data breach. Served as lead counsel in consolidating lawsuits nationwide, securing multiple dismissals, and engaging in early motion practice that set the stage for a favorable settlement.
- Successfully defended a health care provider in a class action complaint alleging violations of patient privacy rights. Obtained dismissal of the entire complaint.
- Lead counsel for a national financial services company in defending more than 20 class action lawsuits following a data breach impacting more than 500,000 individuals nationwide. Defense includes coordination of multidistrict litigation and the representation of numerous defendants, including several hospital systems.
- Currently representing a health care system in a putative CIPA wiretapping class action involving Microsoft Clarity session replay software.
- Successfully defended a popular online ceiling fan manufacturer in two successive lawsuits involving website tracking technologies and TCPA claims. Our team negotiated early, favorable resolutions while also strengthening the company's compliance posture and reducing the risk of future claims.
- Successfully defended an American fast-casual restaurant chain in litigation alleging website violations of the Americans with Disabilities Act (ADA). Our team conducted a privileged investigation,

assessed accessibility compliance, and crafted a strategy focused on early resolution, which resulted in a favorable outcome for the client.

- Defended an automotive original equipment manufacturer (OEM) against a \$7.5+ billion class action filed in Florida challenging session replay software that allegedly tracks users' activities on websites. Shortly after we obtained an early-stage stay of discovery, the plaintiff voluntarily dismissed the case with no settlement.
- Currently defending an automotive OEM against a class action brought under the California Invasion of Privacy Act (CIPA) in state court.
- Defended a regional health care entity in a pending class action filed in Tennessee state court alleging violation of Tennessee's State Wiretapping Act.
- Successfully defended a national online retail client against multiple Video Privacy Protection Act (VPPA) class actions filed in New York and Florida; the cases were dismissed at the motion-to-dismiss phase before a class could be certified.
- Achieved dismissal for an insurance company from a Telephone Consumer Protection Act (TCPA) class action lawsuit in which it had been wrongly targeted.
- Defended a plastic surgery medical practice against a class action lawsuit alleging violation of Florida state privacy law.
- Facilitated a nuisance-value, individual settlement for an innovative building and siding solutions company in a putative CIPA trap-and-trace class action through informal negotiations with opposing counsel.
- Facilitated a nuisance-value, individual pre-suit settlement for a health care provider in a threatened CIPA pen register/trap-and-trace class action through negotiations with opposing counsel.
- Facilitated a nuisance-value, individual pre-suit settlement for a global specialty chemical company in a threatened CIPA pen register/trap-and-trace class action through negotiations with opposing counsel.
- Obtained a dispositive, voluntary dismissal of a global biometric identity verification technology provider in a putative BIPA class action involving a cryptocurrency exchange customer's use of a biometric identity verification solution through informal discussions with opposing counsel.