

Perkins
Coie



Is Your Website Attracting Customers or Plaintiffs?

*Why Wiretapping And Video Tape
Rental Laws Matter To Your
Company's Website*

SEPTEMBER 25, 2024

PRESENTED BY: JESSICA GELLER (AMPLIFY) | JOHN ROCHE (PERKINS COIE)

Roadmap

- Summary Of Pixels And Tracking Software
- Wiretap Act/California Invasion of Privacy Act
- Video Privacy Protection Act
- Key Takeaways

Summary Of Pixels And Tracking Software



Pixels allow website developers to learn:

- When website users take certain actions on their website; and
 - Information about those users, which can be used for targeting advertising.
-

Summary Of Pixels And Tracking Software (cont'd)

- **Software development kits (SDKs):** prebuilt software tools that allow website developers to implement a particular function, such as billing or displaying advertisements. For advertising, they allow a website to connect to a larger ad network that delivers personalized ads to users, collect user data via cookies to send to the ad network, and the websites then receive a share of the resulting ad revenue.
- **Cookies:** text files with small pieces of data (e.g., a username and password) that are used to identify your computer as you use a network.
 - **First-party cookies:** created by websites when you visit them to recognize users so they can do things like easily log you in and remember all the items you've placed in a shopping cart.
 - **Third-party cookies:** created by parties other than the website owner (e.g., advertising companies) to track you across different websites to do things like deliver personalized ads.

Summary Of Pixels And Tracking Software (cont'd)

- **Types of Cookies**

- Necessary or essential cookies: Are essential to browse the site and use its features (e.g., remembering all the items you've placed in a shopping cart).
- Preference or functionality cookies: Allow a site to remember choices you've made in the past (e.g., preferred language; region for weather reports; username/password so you can automatically log in).
- Statistics/performance/analytics cookies: Collect info about how you use a site (e.g., which pages you visited or links you clicked on). These are anonymized and their sole purpose is to improve website functions.
- Marketing or targeting cookies: Track your online activity to help advertisers deliver more relevant advertising or to limit how many times you see an ad.

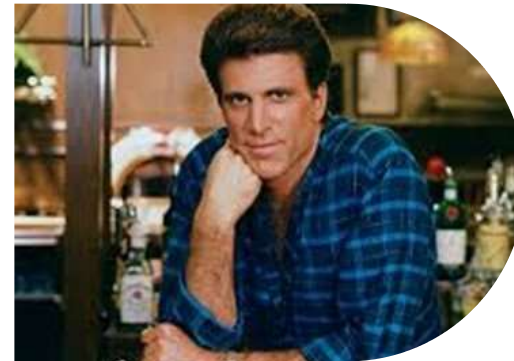
- **Cookie Banners**: Explain a site's use of cookies so users can make an informed choice regarding access to their personal data.

The Wiretap Act – A Tale of Two Ralphs

Berger v. New York, 388 U.S. 41 (1967)



Ralph Berger



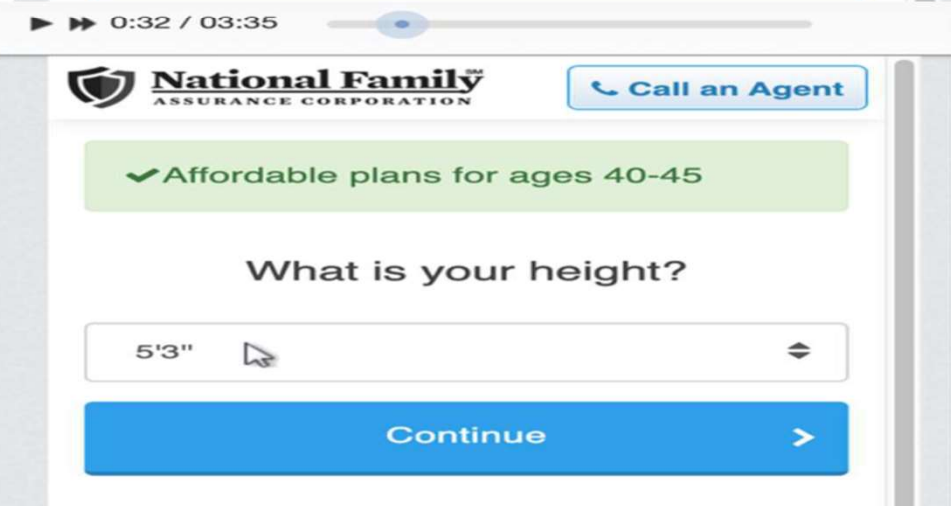
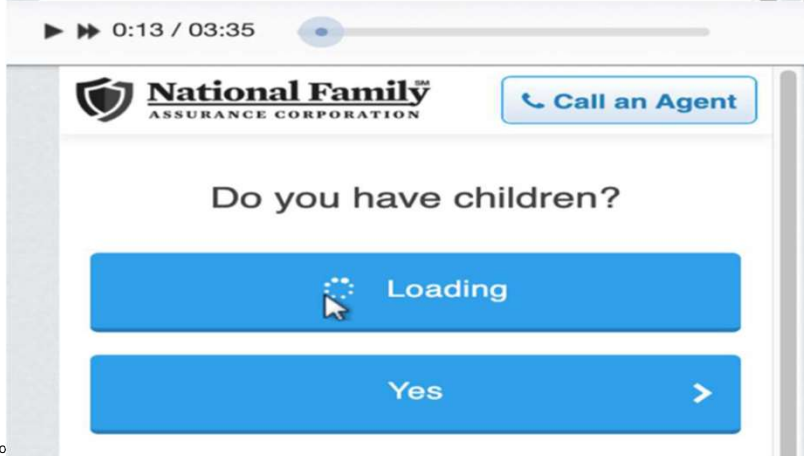
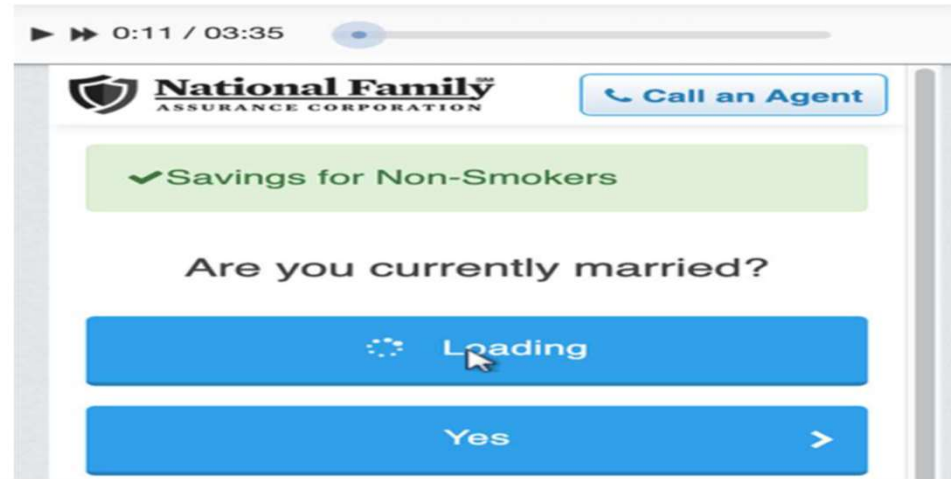
Ralph Pansini

Explosion in Website Wiretap Cases Since 2022

- ***Javier v. Assurance IQ*, 2022 WL 1744107 (9th Cir. May 31, 2022)**: insurance website allowed users to request life insurance quotes by filling out a form with demographic info and medical history. The form was operated by a third party that captured plaintiff's interaction and created a video of it.
 - Court ruled that CIPA (1) applies to Internet communications; (2) requires the consent of all parties for a third-party to learn the contents of a communication; and (3) consent must be given before the communication occurs.
- ~900 cases filed since *Javier*.
 - Plaintiff's firms use cookie scanners to investigate websites.
 - Followed by demand letters and/or legal action.

Website Examples from Complaint in *Javier v. Assurance IQ*

Perkins
Coie



Elements & Damages In Wiretap Cases

- Federal Wiretap Act, 18 U.S.C. § 2511
 - intercept
 - contents of a communication
 - using a device
 - without consent from at least one party
 - Damages: fees/costs, actual damages, and statutory damages of greater of \$100 for each day of violation or \$10,000. *Id.* § 2520.
- California Invasion of Privacy Act (CIPA), Cal. Penal Code § 631(a)
 - all-party consent required
 - Damages: greater of \$5k per violation or 3x actual damages. *Id.* § 637.2.

Interception = Contemporaneous

- But some delay in copying or redirecting messages is not fatal to application of the Wiretap Act.
 - Allegation that tracking pixels operate by duplicating and redirecting their communications with a webpage is sufficient. **See *Smith v. Loyola University Medical Center*, 2024 WL 3338941 (N.D. Ill. July 9, 2024).**
 - Wiretap Act can still apply to a 15-minute delay in transmission. **See *Facebook v. State*, 254 N.J. 329 (2023).**

Contents Of A Communication

- Content is defined as “any information concerning the substance, purport, or meaning of” a communication. 18 U.S.C. § 2510(8).
 - “Courts employ a contextual case-specific analysis hinging on how much information would be revealed by the information’s tracking and disclosure.” *Hammerling v. Google, LLC*, 615 F. Supp. 3d 1069, 1092 (N.D. Cal. 2022).
- Non-content generally includes identifiers (name, IP address, email address, phone #), interactions (button clicks, mouse movements) and URLs.

Contents Of A Communication (cont'd)

- But non-content coupled with substantive information is content.
 - Medical information: *In re Pharmatrak*, 329 F.3d 9 (1st Cir. 2003) (sign-up information provided to pharmaceutical websites, including names, addresses, telephone numbers, and email addresses are content when coupled with medical information).
 - Travel information: *Price v. Carnival Corp.*, 2024 WL 221437 (S.D. Cal. Jan. 19, 2024) (dates of travel and travel locations coupled with passport number, driver's license number, date of birth, home address, phone number, email address and/or payment information are content).
 - Search queries: *Doe v. Microsoft*, 2023 WL 8780879 (W.D. Wash. Dec. 19, 2023) (URLs containing search queries are content)

Website Example from Complaint in *Yoon v. Lululemon*

Checkout

✓ **Notifications to** Email [redacted] [Edit](#)

✓ **Pickup for** Name [redacted] [Edit](#)

✓ **Pickup at** San Francisco Centre
845 Market Street
Available Today, February 8
If ordered before 5pm. [Edit](#)

✓ **Paying with** Visa ending in [redacted] [Edit](#)

PLACE ORDER

Lululemon will use information you submit (including identifiers, commercial information, and internet or other electronic network activity information) to fulfill this request. To learn more, see our [privacy policy](#) and [terms of use](#).

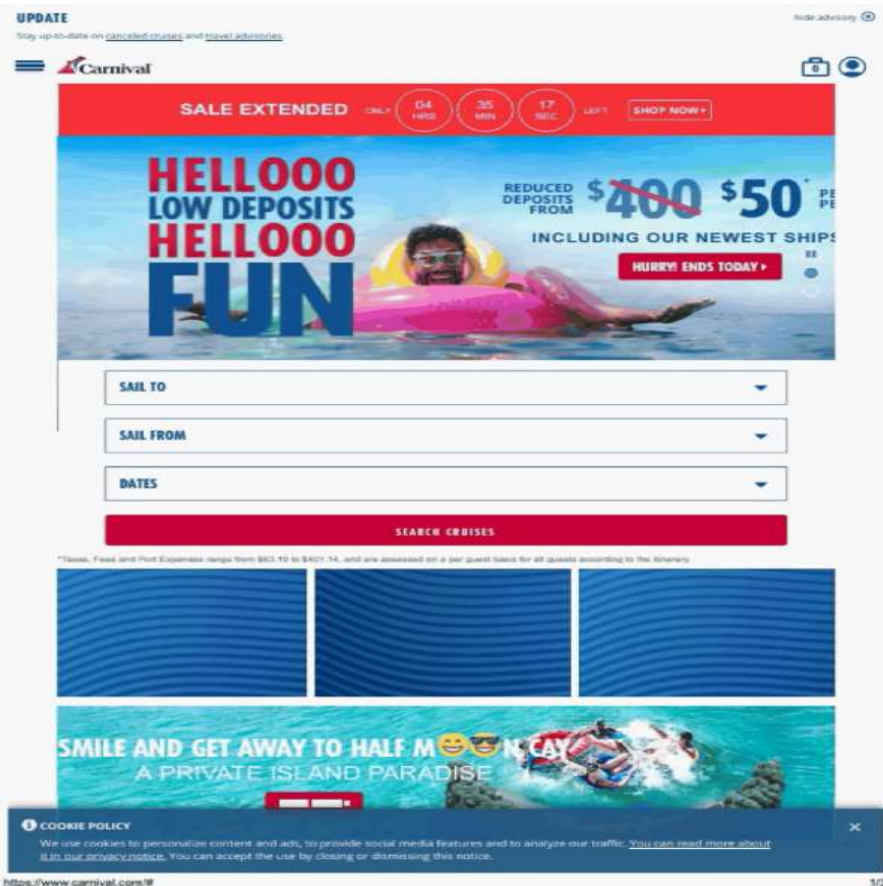
Contact Us
Live Chat
1.877.263.9300

- *Yoon v. Lululemon*, 549 F. Supp. 3d 1073, 1082-83 (N.D. Cal. 2021)
 - Lululemon used third-party “session replay” software to capture customer interactions with their website.
 - Holding: not “content” for third-party to record plaintiff’s “keystrokes, mouse clicks, pages viewed, and shipping and billing information ... [and] the date and time of the visit, the duration of the visit, Plaintiff's IP address, her location at the time of the visit, her browser type, and the operating system on her device.”
 - Note: third-party recording of what was purchased might have been a different story.

Consent

- One-party consent defeats federal Wiretap Act claims. *But see* crime-tort exception in 18 U.S.C. § 2511(2)(d).
- All-party consent requires disclosures that “explicitly notify” users of the practice at issue. ***Doe v. Microsoft***, 2023 WL 8780879, at *6 (W.D. Wash. Dec. 19, 2023).
 - Notifying that you will disclose “personal information to third parties” is too vague to include personal health information. *Id.*
 - Notice has been deemed insufficient where:
 - Hidden at the bottom of a page;
 - Appears in small print; or
 - Only visible to users if they scroll down to the next screen. ***See Price v. Carnival Corp.***, 2024 WL 221437 (S.D. Cal. Jan. 19, 2024).

Insufficient Consent



Price v. Carnival Corp., 2024 WL 221437, at 85 (S.D. Cal. Jan. 19, 2024)

- Text of the banner is smaller than the rest of the bold, large typeface found on Carnival’s homepage.
- The notice is far below the relevant buttons that a user may click, the blue of the banner matches the blue of other web panels, and the white text of the banner blends in with the website’s white background.
- Carnival did not demonstrate that the banner appears immediately or that the banner persists for the entirety of a user’s visits.
- A user may be distracted by the large red buttons inviting them to “SHOP NOW” or “SEARCH CRUISES” and never view the slim banner across the bottom of their screen.

Crime-Tort Exception To Consent For Federal Claims

- One-party consent immunity is inapplicable where the “communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.” 18 U.S.C. § 2511(2)(d).
 - Alleging defendants wanted to “improve their marketing and advertising efforts” is not a crime/tort because the “defendant's primary motivation is to make money rather than to injure plaintiffs tortiously or criminally.” **Roe v. Amgen**, 2024 WL 2873482, at *6 (C.D. Cal. June 5, 2024).
 - Alleging a HIPAA violation via disclosure of medical info is sufficient for the crime-tort exception. **See, e.g., Cooper v. Mount Sinai Health Systems**, 2024 WL 3586357 (S.D.N.Y. July 30, 2024); **Sweat v. Houston Methodist Hospital**, 2024 WL 3070184 (S.D. Tex. June 20, 2024).

CIPA, Consent And Chatbots

- ***Jones v. Peloton***, 2024 WL 3315989 (S.D. Cal. July 5, 2024)
 - Chat feature on Peloton’s website is powered by third-party Drift.
 - Peloton users aren’t informed and believe they’re interacting solely with a Peloton rep.
 - Peloton argued it can’t “eavesdrop” on its own conversations and Drift is merely an extension of Peloton.
 - Two lines of cases in CA regarding third-party software providers:
 1. If the third-party acts like a tape recorder that collects info and relays it back to the website owner, then it’s an extension of the website and not an eavesdropper.
 2. If the third-party captures data and exploits it for its own business purposes (e.g., to sell to advertisers or to improve its own platform) it’s an eavesdropper.
 - Outcome: court denied Peloton’s motion to dismiss because the complaint alleged Drift used the chats for its own benefit and not the sole benefit of Peloton

Pen Register/Trap And Trace (PRTT) Claims Under CIPA

- PRTTs record real-time dialing, routing, addressing, or signaling information (e.g., to/from, IP addresses) regarding a communication, but there is no federal civil cause of action for an unauthorized PRTT. See 18 U.S.C. § 3121, *et al.*
- CIPA has a private cause of action and prohibits installing a PRTT without a court order or user consent, unless necessary to operate the service. See Cal. Penal Code § 638.51.
- Courts are entertaining CIPA claims based on allegations that websites send identifying info, device and browser info, geographic info and URL info to marketers in real-time. **See, e.g., *Moody v. C2 Educational Systems***, 2024 WL 3561367 (C.D. Cal. July 25, 2024).

Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710



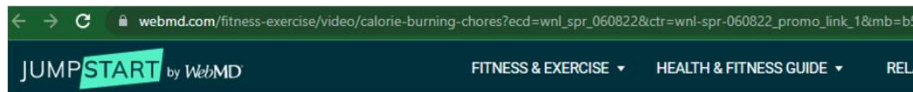
Summary of VPPA

- VPPA prohibits a “video tape service provider” from knowingly disclosing a “consumer’s” “personally identifiable information” to another. 18 U.S.C. § 2710(b)(1).
- Congress amended the VPPA in 2012 “to reflect the realities of the 21st century” to allow providers to obtain consent from consumers via the Internet, leaving no doubt it applies to streaming services. 158 Cong. Rec. H6849–01 (Dec. 18, 2012).
- Civil actions for (1) actual damages (statutory damages no less than \$2,500); (2) punitive damages; (3) attorneys’ fees and litigation costs. 18 U.S.C. § 2710(c).

Are You A “Video Tape Service Provider”?

- A provider = anyone engaged in the business of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials. 18 U.S.C. § 2710(a)(4).
- Providers of live content aren’t covered. **See Walker v. Meta Platforms, Inc.**, 2023 WL 3607282, at *5 (N.D. Cal. Mar. 3, 2023).
- This definition requires “that the rental, sale or delivery of audio visual materials is a defining feature, or at least not a de minimis feature, of the business.”
Rodriguez v. JP Boden Services, 2024 WL 559228, at *4 (S.D. Cal. Feb. 12, 2024) (clothing retailer not covered); **Carroll v. Gen. Mills, Inc.**, 2023 WL 4361093, at *1 (C.D. Cal. June 26, 2023) (food manufacturer not covered).
 - **But see Rancourt v. Meredith Corp.**, 2024 WL 381344, at *14 (D. Mass. Feb. 1, 2024) (rejecting “centrality of the video business” analysis and finding an app for recipe videos was covered); **Lebakken v. WebMD, LLC**, 640 F. Supp. 3d 1335, 1340 & n.2 (N.D. Ga. 2022) (online health information provider was covered based on allegation that it delivers prerecorded audio-visual materials to consumers via its website).

Website Example from Complaint in *Lebakken v. WebMD*



Fitness & Exercise > Videos

Calorie-Burning Chores



- *Lebakken v. WebMD, LLC*, 640 F. Supp. 3d 1335, 1340 & n.2 (N.D. Ga. 2022):
 - Bare allegations that “WebMD is engaged in the business of delivering prerecorded audio-visual materials to consumers via its e-newsletter and its website” and plaintiff “exchanged her email address to receive the WebMD e-newsletter and that she also created her own WebMD account” were sufficient.
 - Video is 46 seconds long.

Are Visitors To Your Website “Consumers” Under The VPPA?

- Consumer = any renter, purchaser, or subscriber of goods or services from a covered provider. 18 U.S.C. § 2710(a)(1).
- Using a free app to view content does not make one a subscriber or consumer. **See *Ellis v. Cartoon Network, Inc.***, 803 F.3d 1251, 1257 (11th Cir. 2015). Although payment is not by itself determinative, a subscription requires some form of “commitment, relationship, or association (financial or otherwise) between a person and an entity.” *Id.* at 1256.
- Or does it? **See *Yershov v. Gannett Satellite Info. Network, Inc.***, 820 F.3d 482, 489 (1st Cir. 2016) (although plaintiff didn’t pay for the free app, he provided consideration in the form of access to his personal information, which created a subscriber relationship).
 - Providing access to videos beyond what any visitor to your website can see in return for providing PII appears to be the distinguishing factor. **See *Harris v. Pub. Broad. Serv.***, 662 F. Supp. 3d 1327, 1331-32 (N.D. Ga. 2023) (providing PII in return for receiving newsletters and emails giving access to “restricted content” made plaintiff a consumer).

Are You Disclosing “Personally Identifiable Information?”

- Info identifying a person as having requested or obtained specific video materials or services from a covered provider. 18 U.S.C. § 2710(a)(3).
- PII covers info identifying a video plus:
 - Name/address/phone number
 - User ID (e.g., Facebook ID or email address)
 - GPS location at the time someone viewed a video
 - Device identifier or IP address (in the First Circuit but not Third or Ninth)
 - *Eichenberg v. ESPN*, 876 F.3d 979, 985 (9th Cir. 2017) (PII is info “that would readily permit an ordinary person to identify” someone); *In re Nickelodeon*, 827 F.3d 262, 284 (3d Cir. 2016) (same).
- PII does NOT cover:
 - URLs without any indication of the video viewed
 - Browser and operating system setting
 - Anonymized or aggregated data

VPPA's Exceptions For Disclosure Of PII, 18 U.S.C. § 2710(b)(2).

- Disclosure of PII is permissible to:
 - The consumer
 - Law enforcement or civil litigants with appropriate legal process
 - Anyone with the informed, written consent of the consumer
 - Anyone if the disclosure is solely of the names and addresses of consumers and (i) the provider gives the consumer a clear and conspicuous opt-out, and (ii) the disclosure does not identify the title, description, or subject matter of audio-visual material, though the subject matter can be disclosed for the exclusive use of marketing goods and services directly to the consumer
 - Anyone if the disclosure is incident to the provider's "ordinary course of business"

“Ordinary Course Of Business” Exception Is Narrow

- “Ordinary course of business” is limited to “debt collection activities, order fulfillment, request processing, and the transfer of ownership.” 18 U.S.C. § 2710(a)(2).
- Intra-corporate disclosures to ensure smooth business operations (e.g., customer support, internal data analytics, or cyber security) fall within the ordinary course of business. *Rancourt v. Meredith Corp.*, 2024 WL 381344, at *17 (D. Mass. Feb. 1, 2024).
- But disclosure to third parties “to better target ads does not constitute an intra-corporate disclosure or a disclosure in support of management operations.” *Id.*; *see also Saunders v. Hearst Television, Inc.*, 2024 WL 126186, at *4 (D. Mass. Jan. 11, 2024) (third-party disclosures for “marketing, advertising, and analytics” are not within scope of ordinary course of business exception).

Informed Written Consent, 18 U.S.C. § 2710(b)(2)(B).

Consent must be:

- in a form distinct and separate from general privacy policies or terms of service;
- at the election of the consumer, either given in real time or in advance for a period of up to 2 years with an opportunity to withdraw consent at any time; and
- coupled with an opportunity for the consumer to withdraw on a case-by-case basis or to withdraw from ongoing disclosures.

Key Takeaways: Preemptive Measures

- Understand what pixels, cookies or SDKs you're using and what's being shared with whom
 - Who owns these functions within the company (e.g., marketing, IT)?
 - Ensure you haven't simply copied from prior templates
- Review your privacy policy/terms for accuracy
- Develop a governance program
 - Vendor assessments
 - Contractual protections: what can vendors collect and how can they use it?
- Implement consent management technologies (e.g., cookie manager) and leverage experience with GDPR/CCPA compliance
- Training and privacy by design

Key Takeaways: What To Consider If You're Sued

- Have prerequisites been satisfied?
 - Do you have an informal dispute resolution clause in your terms?
- Are you happy with the forum?
 - Do you have an arbitration clause?
 - Does it have a “batching” provision where multiple arbitration claims can be treated as a single claim for fee purposes?
 - Does it have cost-splitting provisions?
 - Do you have a “bellwether” provision permitting you to select a small number of representative cases from a larger pool of similar claims to be decided first?
- Assess the likelihood of a successful motion to dismiss
 - Are you a covered provider; are you disclosing covered data?
 - Do you have clear consent?
- Does an offer of judgment or early settlement make sense?
 - Confidentiality provision in settlement agreement to prevent copycat cases
 - Clause in settlement agreement prohibiting voluntary cooperation with subsequent plaintiffs (but cannot cover plaintiffs' firms or involuntary cooperation, e.g., via subpoena)