



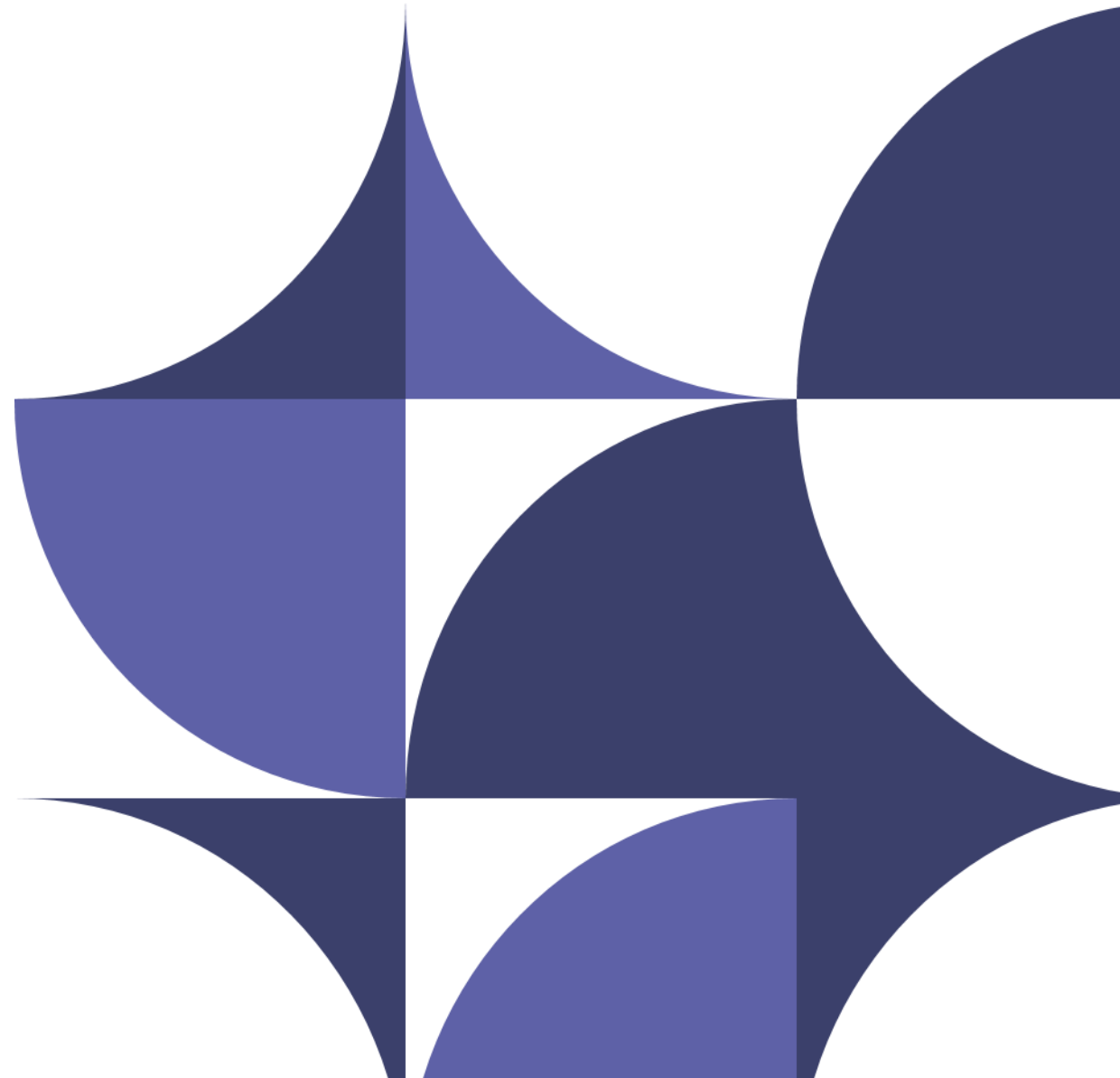
# Hot Topics and Trends in California Consumer Class Actions

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Dummit

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**Seyfarth Shaw LLP**

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# Agenda

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- 01** COVID-19 Consumer Class Action Developments
- 02** Latest TCPA Decisions and Trends
- 03** Eavesdropper and Call Recording Claims Under CIPA
- 04** Recent Developments in Privacy/Data Breach
- 05** False Advertising Claims
- 06** Latest Developments Concerning Arbitration and Class Waivers
- 07** Latest Decisions and Trends Involving Live Sports, Entertainment, and Recreation

# Speakers

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**Robert Milligan**  
Litigation  
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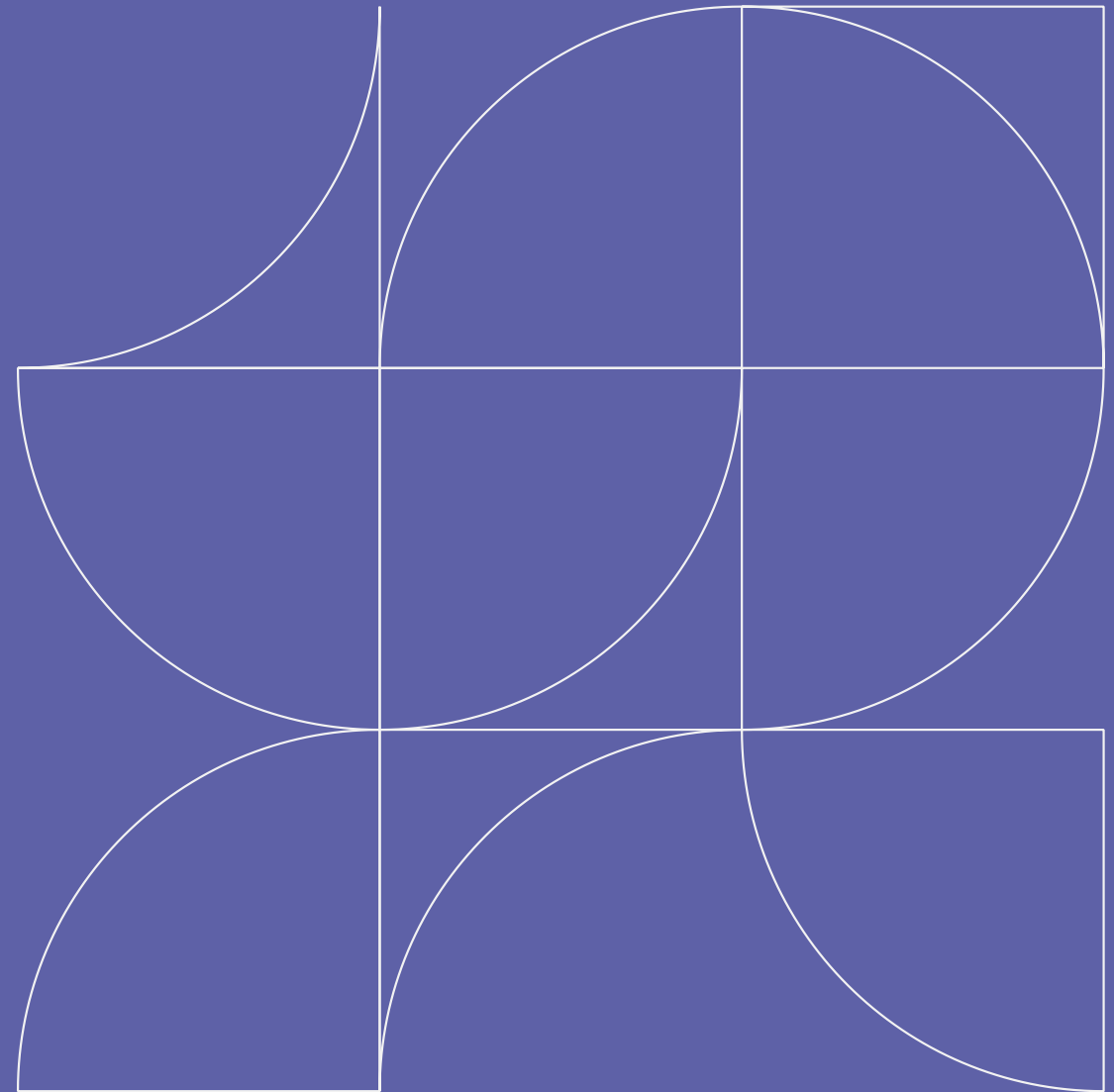


**Daniel Joshua Salinas**  
Trade Secrets, Computer  
Fraud & Non-Competes  
LOS ANGELES/  
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**Darren W. Dummit**  
Litigation  
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# COVID-19 Consumer Class Action Developments



- **New Industries and New Marketing Techniques**
  - E.g., Recreational Cannabis, text message marketing, shared / sold private info
- **Automatic Withdrawals and Recurring Direct Deposits**
  - E.g., Gym membership, Co-working Spaces
- **Emergence and Consolidation of Entertainment Partnerships**
  - E.g., Ski resort annual passes, Club/Restaurant Memberships
- **Emergence of Third-Party Brokers and Platforms**
  - E.g., Ticket broker resellers, Platform-as-a-service companies
- **Changing Landscape of Higher and Advanced Education**
  - E.g., Traditional Universities, online universities, student services

## **Recent Meaningful Trends Leading Up to COVID**

- **Many companies internal policies not yet fully formed**
  - Refunds
  - Credits
  - Customer Information
- **Many past/existing form contracts are not always updated to reflect new trends**
  - Terms and conditions
    - Past and Present
  - Consents and Opt-Outs

## **Recent Meaningful Trends Leading Up to COVID**

(Continued)

# Commercial Issues in a Post- COVID World

- **Forced government shutdowns**
  - Sporadic and indefinite; Phased re-openings; Indefinite closures
- **Social distancing requirements**
  - Reduced capacity and Reduced efficiency
- **Supply-chain disruptions**
  - Both acute and long term
  - Especially problematic for “**non-essential**” services during PPE and other shortages
- **Cash flow emergencies**
  - Both up and down stream

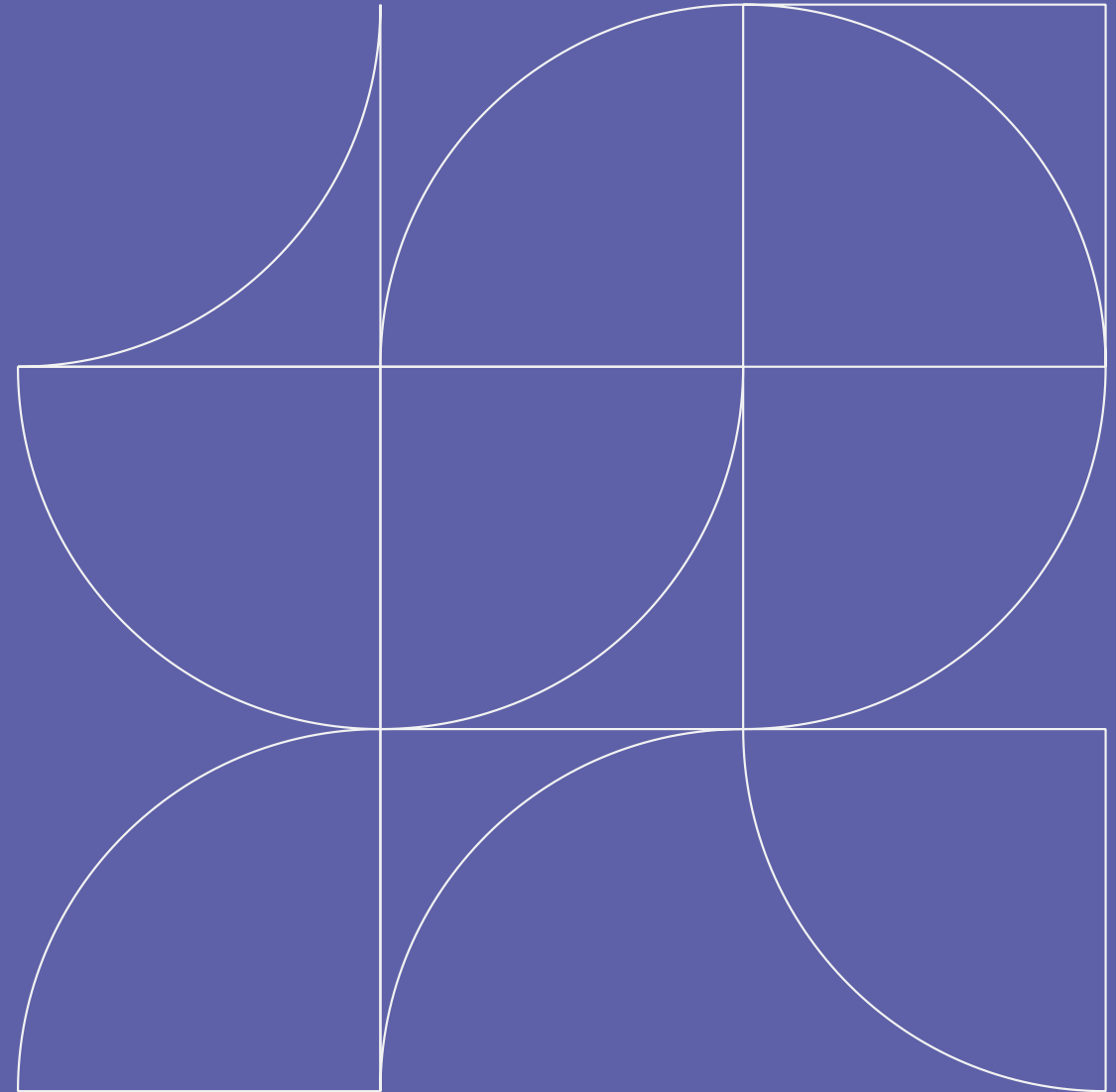


# Commercial Issues in a Post- COVID World

(Continued)

- **Uncertainty over judicial enforcement and/or relief (both judicial and legislative)**
  - Temporary moratoriums; Length and timing of remedy
  - What “**equitable principles**” will be applied, how/when
- **Uncertainty over Services Being Offered or Being Available**
  - Cancellation vs. Postponement
  - Full access vs. Partial offerings
- **Industry-wide goal posts changing**
  - Fine line between “**worsened economic circumstances**” and “**impossibility or frustration of purpose**”
  - “**Time is of the essence**” clauses viewed differently now than ever before
- **Employee Limitations and Modifications**

# Latest TCPA Decisions and Trends



# TCPA “Robo” Calls and Texts

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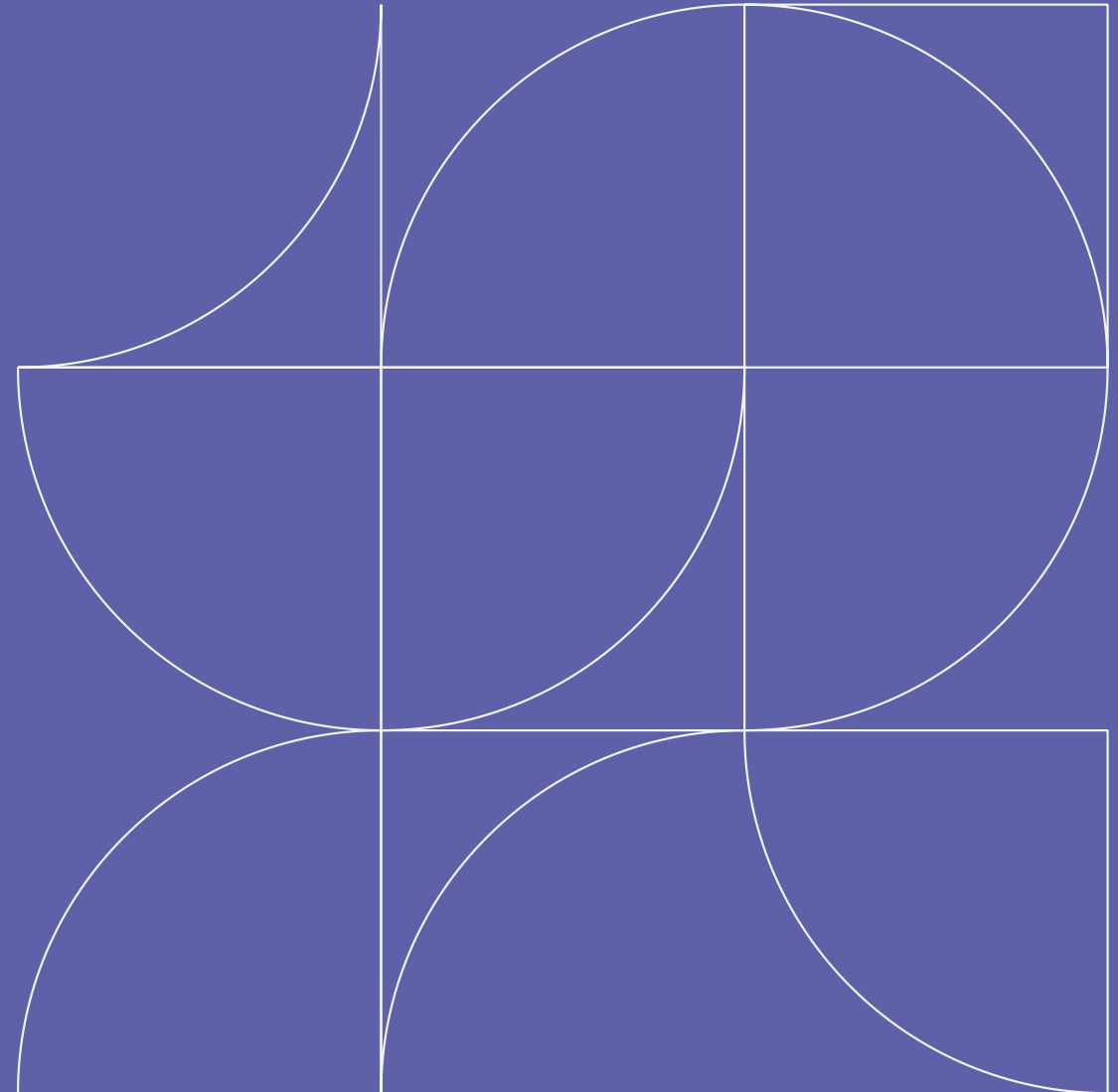
- **The Telephone Consumer Protection Act (TCPA)**
  - 1991: Unwanted telemarketing phone calls and faxes
  - Prohibit **pre-recorded “robo” calls** unless receiving party consents
  - Statutory damages of \$500-\$1,500 per call / violation
- **Evolving Use and Application**
  - Cell Phones, Texts, Emails become primary means of communication / marketing
  - Third Party Marketing companies specializing in **new forms of marketing**
- **Cannabis Industry Hot Spot**
  - New companies racing to market; state-by-state restrictions; advertising regulations
  - Flood of suits pre and post-Covid against Cannabis industry (up and down stream)

# Supreme Court's 2020-2021 TCPA Action

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- **July 2020: Barr v. American Association of Political Consultants**
  - First major challenge – limited exception for gov't debts stricken, law upheld
  - Three Days Later....certiorari granted in **Facebook, Inc. v. Duguid** (definition of ATDS)
- **April 2021: Facebook Inc. v. Duguid (restricting TCPA to “randomly-fired” calls/texts)**
  - Narrow reading of “automated telephonic dialing system”, must have capacity to**(1)** to store a telephone number using a random or sequential generator; OR **(2)** to produce a telephone number using a random or sequential number generator.
  - No bright-line test for “how much automation is too much”...”at least some intervention”
- **What to Expect Ahead?**
  - Drastic Reduction in Class Actions filed under TCPA (and no more Circuit split)
  - Increased pre-suit investigation,; combined claims; past terms and conditions

# Eavesdropper and Call Recording Claims Under CIPA



# Eavesdropper/Call Recording Claims under CIPA:

## Anatomy of CIPA

- California's Invasion of Privacy Act, Cal. Penal Code § 630, *et seq.* ("CIPA") was enacted in 1967 to curb aggressive wiretapping and related privacy invasions
- As technology has evolved over the years, CIPA has been supplemented with additional sections
- CIPA's key sections cover landline call monitoring or recording (§ 632) and cellular phone call recording or interception (§ 632.7)



# CIPA Penalties

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- CIPA created a private right of action for violation of its provisions. That private right of action is codified in California Penal Code Section 637.2, which provides that:

Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts: (1) Five thousand dollars (\$5,000) per violation. [or] (2) Three times the amount of actual damages, if any, sustained by the plaintiff.

# Eavesdropping/Call Recording Claims under CIPA: What's the Difference?

Cal. Penal Code § 632(c)

vs.

Cal. Penal Code § 632.7(a)

- nonconsensual
- landline communications
- eavesdropping/monitoring or recording
- confidential communications

- nonconsensual
- communications involving a cellular or cordless phone
- intentional recording
- any communication



# Eavesdropper/ Call Recording Claims under CIPA:

## Best Practices

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- Ensure consent before recording
  - Make warnings non-bypassable
  - Change automated warning to say, “Calls may be monitored *or recorded* for quality assurance purposes”
  - Remember it applies to inbound calls as well
- Be mindful of the differences between § 632(c) and § 632.7(a)
  - Are the communications confidential?
  - Is the recording intentional?
  - What type of communications?



# Section 632.7 Claims

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- Because Section 632.7 has no confidentiality requirement, the plaintiffs' bar has argued that all that is required for a violation of Section 632.7 is the recording without consent of a telephone call where one party used a cell phone.
- Some courts in particular accepted this argument, often without conducting much analysis, if any, of the actual statutory language of Section 632.7. Those courts effectively rewrote the statute as:

Every person who, without the consent of all parties to a communication, ~~intercepts or receives and~~ intentionally records, or assists in the ~~interception or reception~~ and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone shall be punished[.]

Under those courts' interpretation, the words "intercepts or receives and" as well as the words "interception or reception and" in Section 632.7 do not mean anything.

# New California Supreme Court Decision

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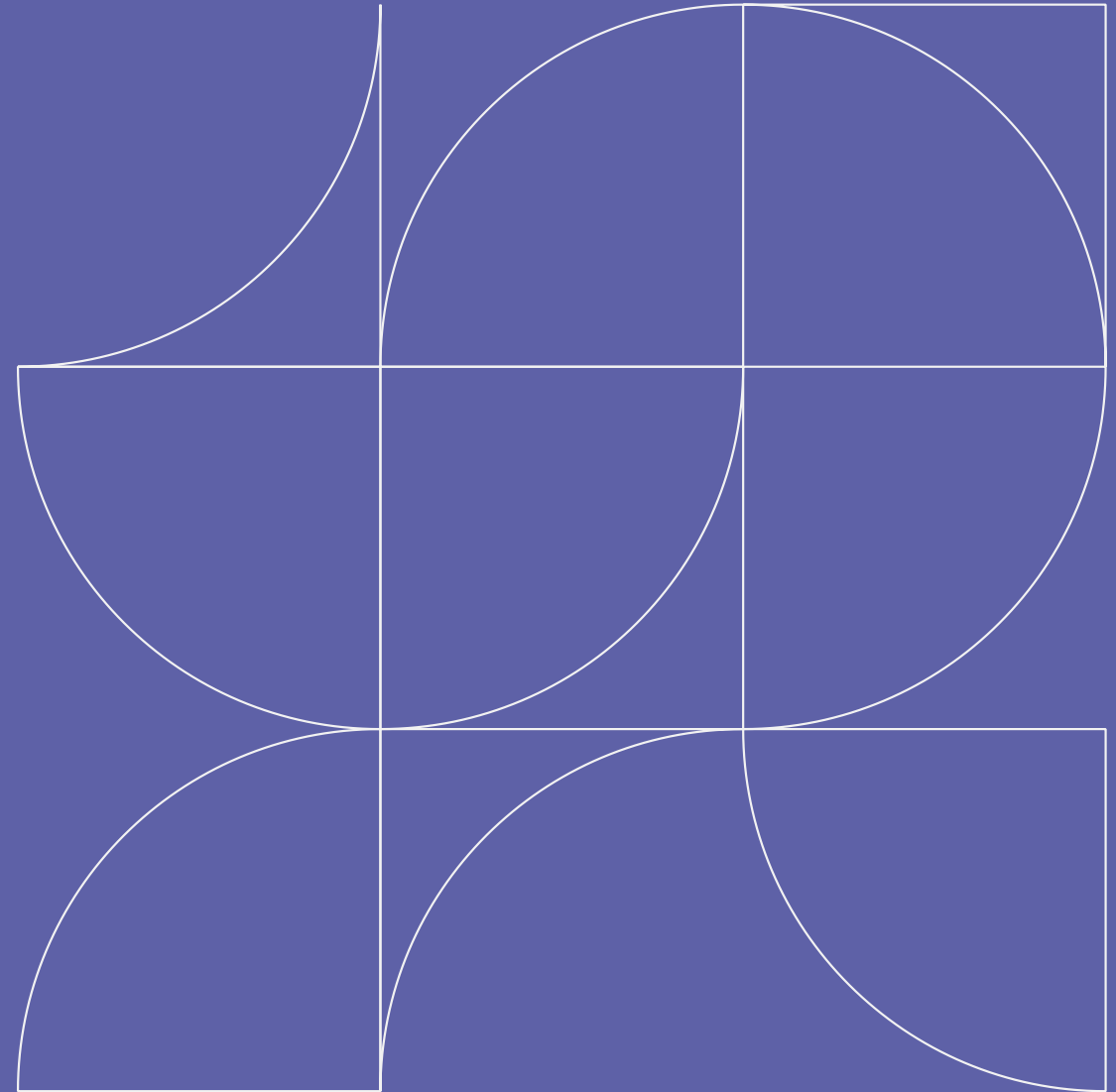
- The Supreme Court of California, interpreting California Penal Code section 632.7, recently held in *Smith v. LoanMe, Inc.* that cellular or cordless phone conversations cannot be recorded by nonparties *or the parties to the call* without consent of the parties. This decision overturned the Court of Appeal's previous ruling that consent is only required if nonparties, and not the parties to the call, seek to record the conversation. Therefore, companies must ensure that they obtain consent prior to recording their calls, or else criminal and civil liability may ensue.
- The Court looked to the language of the statute, which specifically addresses a person who “interprets or receives” a call and intentionally records it without the parties’ consent. Because a party to the call is a person who “receives” the call, the statute therefore forbids parties to the call from recording the conversation without the other party’s consent. The Court went on to say, “Although parties might normally be regarded as consenting to the receipt of their communications by other parties to a call, this acquiescence would not, by itself, necessarily convey their consent to having these communications recorded.”

# California Supreme Court Reasoning

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- "This interpretation reflects the most sensible reading of the statutory text, is consistent with the relevant legislative history, and advances the legislature's apparent intent by protecting privacy in covered communications to a greater degree than the court of appeal's construction would," the justices said."
- "Any perceived harshness in applying section 632.7 to a party's recordation of a non-confidential communication is lessened by the fact that a party can avoid liability under the statute by taking reasonable precautions, such as obtaining the consent to record the statute requires," the justices said.
- Open the floodgates!! Get compliant now.

# Recent Developments in Privacy/Data Breach



# Privacy/Data Breach Statistics (2018 vs. 2020)

- Average time to identify a breach:  
**197 days -> 228 days**
- Average time to contain a breach:  
**69 days ->80 days**
- Number of data breaches in U.S.:  
**1,244 ->3,950**
- Government, retail, and technology  
most popular targets
- 48% of malicious email  
attachments are Microsoft Office  
files





# 2021 Data Breaches

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- California DMV
- California State Controller's Office
- Parler
- Mimecast
- COMB
- Nebraska Medicine
- Facebook
- LinkedIn
- Cancer Treatment Centers of America
- Hobby Lobby



# The Challenges of Remote Work



- Home Computers Used For Work
- Data Existing on Personal Devices and Personal Accounts
- Encryption and Transmission Compromised
- Malware Issues
- Data Location Unknown



# Increased Threats Caused By Remote Work

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- Unsecure personal and public Wi-Fi networks
- Unsecure personal devices
- Unsecure personal email accounts to transfer corporate data
- Syncing with unsecure personal cloud storage accounts
- Unsecure printed materials
- Unencrypted portable electronic storage devices
- Unsecure connections to employers systems (remove desktop software)
- Unsecure conference call lines

# Increased Threats Caused By Remote Work (continued)

- Increased visibility in public locations of confidential information
- Increase phishing schemes and other fraud
- Global pandemic and immediate work-from-home orders stressing infrastructures
- Disgruntled or careless employees who have been furloughed or laid off



# CCPA Recent Developments

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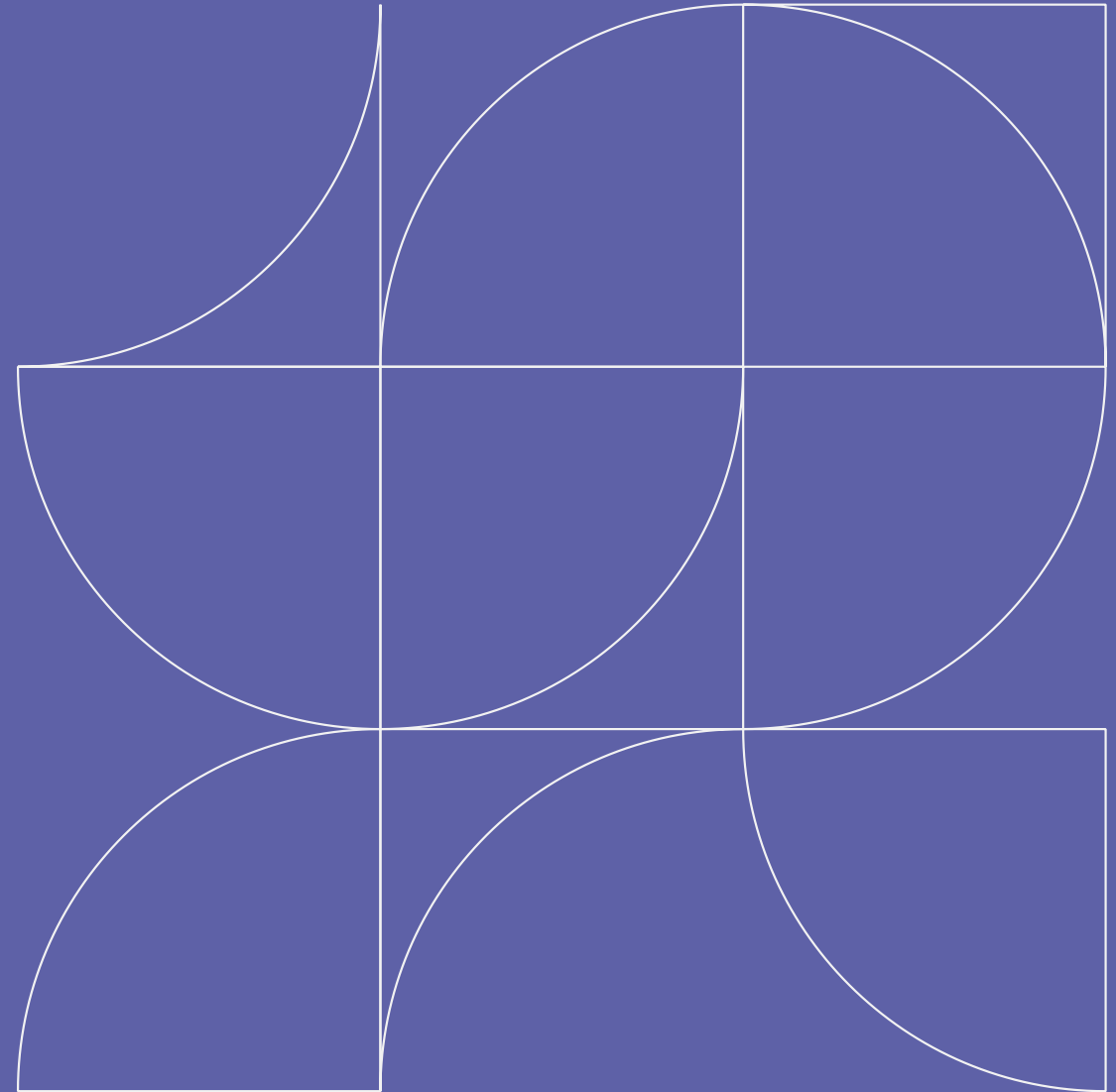
- Mostly data event class actions
- Settlement of first CCPA class action
- Standing requirements

# Expected Litigation Arising From Remote Work

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- **Cybersecurity:** Data breach litigation related to reduced security operations of remote workers.
- **Privacy:** Privacy litigation based on mishandling or improper processing of employee and/or customer data without adequate controls
- **Trade Secrets:** Misappropriation cases (data theft), soliciting customers, data spoliation, etc..

# False Advertising Claims



# Recent False Advertising Class Action Settlements

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- Glucosamine supplements (joint health benefit claims) - **\$53 million**
- Cereal (“heart healthy” and “lightly sweetened” claims) - **\$13 million**
- Online hotel bookings (“sold out” claims) - **\$2.1 million**
- “Sexual Energy” supplements (“potency wood” and “virility” claims) - **\$100,000**

# Recent Dismissals

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- Germ-X hand sanitizer (claimed to kill 99.99% of germs)
  - Plaintiff “has not pled an injury and has failed to allege an injury that ‘actually exist[ed]’ and that affected him in ‘a personal and individual way’” ... [plaintiff] has only pled a conjectural and hypothetical injury.”
- Pop Secret popcorn (safety of partially hydrogenated oils)
  - “the existence of [artificial trans fat] in the . . . popcorn was included in the nutritional label on the product box and Plaintiff d[id] not allege that Defendant’s popcorn labels were misleading.”
- Trader Joe’s Alkaline Water (“as “ionized to achieve the perfect balance”)
  - “a reasonable consumer does not check her common sense at the door of a store.”
- Store brand acetaminophen (“Infants’ Pain & Fever”)
  - “No reasonable consumer would understand Infants’ Product to be specially formulated.”

# Undisclosed Financial Connections

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- *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107 (9th Cir. 2021)
- Nutritional supplement company published a purported independent evidence-based supplement comparison guide
- Plaintiff alleged one of its competitors paid NutriSearch for top-ratings
- District court concluded that guide's statements were unactionable opinions and not commercial speech
- 9th Circuit reversed and remanded

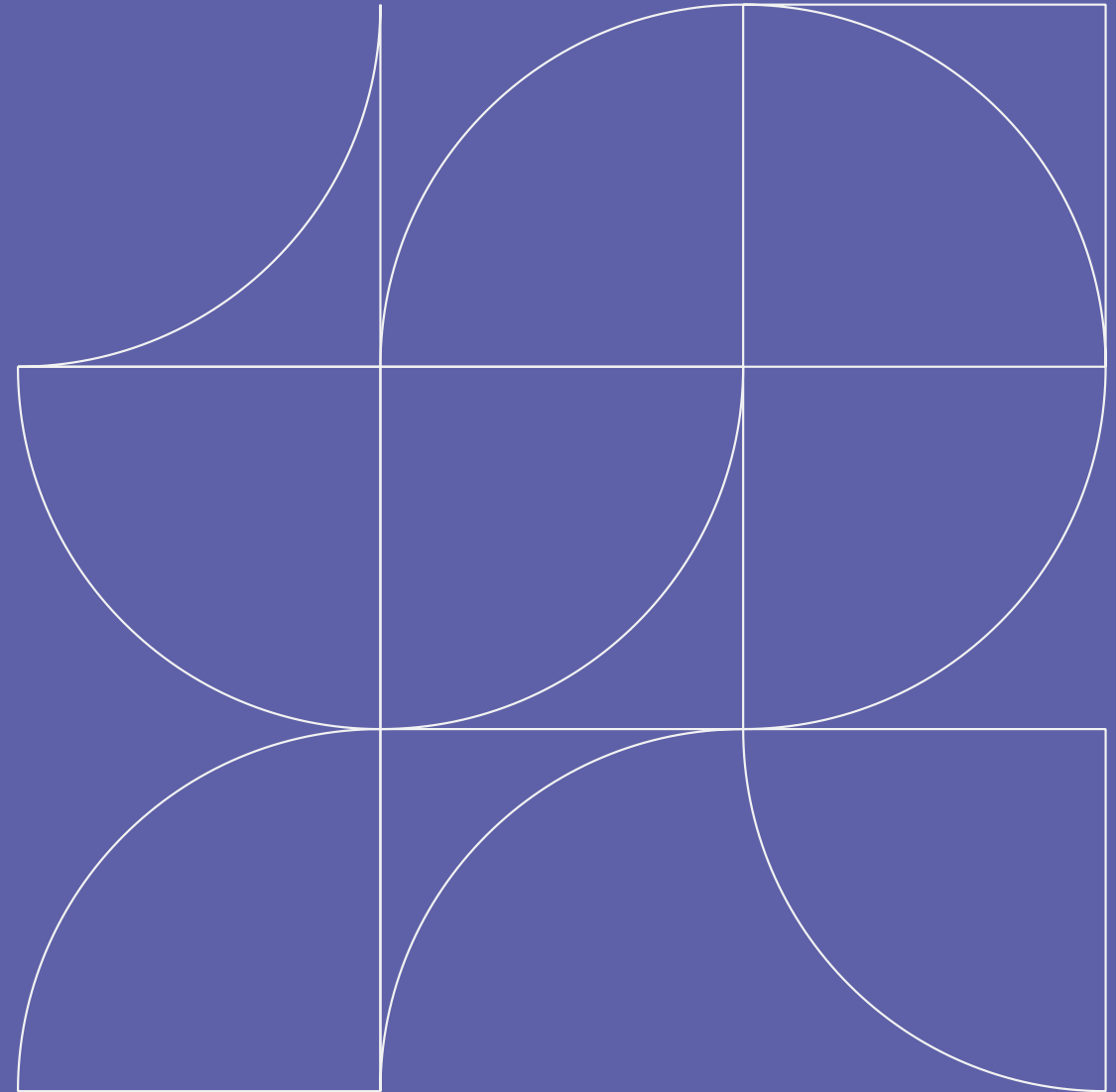


# Federal Pleading Standard

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- *Choon's Design, LLC v. ContextLogic, Inc.*, 2020 WL 6891824 (N.D. Cal. Nov. 24, 2020)
- Defendant operates an online marketplace
- Some products include a “Verified by Wish” badge
  - denotes “best quality”
- Plaintiff asserts
  - many “Verified” products are counterfeit under Section 43(a)(1)(A) (false designation of origin)
  - “Verified” badge “misrepresents the nature, characteristics, [and] qualities” of the third-party products in violation of Section 43(a)(1)(B)
- Motion to Dismiss
  - Rule 9(b) applies to false advertising claims, citing several other district courts in the Ninth Circuit
  - Dismissed with leave to amend

# Latest Developments Concerning Arbitration and Class Waivers



# Arbitration Agreements with CA Consumers

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- Use arbitration agreements with CA consumers
- Include class action waivers
- Must address public injunction issue
- Have arbitrator decide arbitrability
- Affirmative action consenting to agreement.

Kevin Ramirez v. Electronic Arts Inc., case number 5:20-cv-05672, in the U.S. District Court for the Northern District of California.

Andrew J. Brown also argued on behalf of Ramirez that because of the way the provision is written, the court is allowed to decide whether the case should go to arbitration.

"[The provision] makes the clear and unambiguous statement that everybody is permitted to litigate the issue of arbitrability in court," he said. "That's exactly what we're doing."

But Judge Freeman said she disagreed with the attorney's interpretation of the arbitration provision and said he was trying to rewrite it.

**"I know that this is in some ways the death knell of the case, because this is no longer a class action,"** Judge Freeman said.

Still, the judge said she thinks the dispute must go to arbitration, adding that in arbitration, "I think there needs to be a close look at **the scope of the injunction of the arbitration,**" particularly in light of the serious allegations at issue.

# Arbitration Agreements with CA Consumers under McGill

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- In McGill, the California Supreme Court held that no one can contractually waive all rights to seek public injunctive relief.
- The UCL, FAL, and CLRA all authorize public injunctive relief.
- Under McGill, any contract that bars public injunctive relief in both court and arbitration is invalid. By permitting either party to compel arbitration unilaterally, the Agreement effectively cuts off the availability of public injunctive relief in court. So the relief must remain possible in arbitration proceedings, or else the arbitration provision violates California law and triggers the poison-pill clause.
- Is public injunctive relief under the relevant statutes available in an “individual lawsuit” without a plaintiff “act[ing] as a private attorney general”?

# California Court of Appeal Finds that *McGill* is Still Good Law

- *Joe Maldonado v. Fast Auto Loans, Inc.*, G058645 (4/3 2/8/21) (O'Leary, Aronson, Thompson) centered on whether *McGill v. Citibank, N.A.*, 2 Cal.5th 945 (2017) is still good California law and whether it has been preempted by the Federal Arbitration Act. *McGill* held that an arbitration provision was invalid and unenforceable because it required consumers to waive their right to pursue public injunctive relief.
- Maldonado and others brought a putative class action alleging Fast Auto Loans, Inc. charged unconscionable interest rates on loans in violation of the Financial Code. Fast Auto Loans moved to compel arbitration, based on a broad arbitration provision that would have resulted in a waiver of class actions and the plaintiffs' ability to bring an action for public injunctive relief. The trial court held that the *McGill* rule made the arbitration provisions unenforceable, and the Court of Appeal affirmed the order denying the motion to compel arbitration.
- The Court of Appeal concluded that *McGill* is good law. Fast Auto Loans' argument that FAA preemption applied was wrong, because SCOTUS recently denied review of Ninth Circuit cases applying *McGill*, leaving the Court of Appeal to apply *McGill*, a case decided by the California Supreme Court.

# Public Injunctive Relief Available in Arbitration

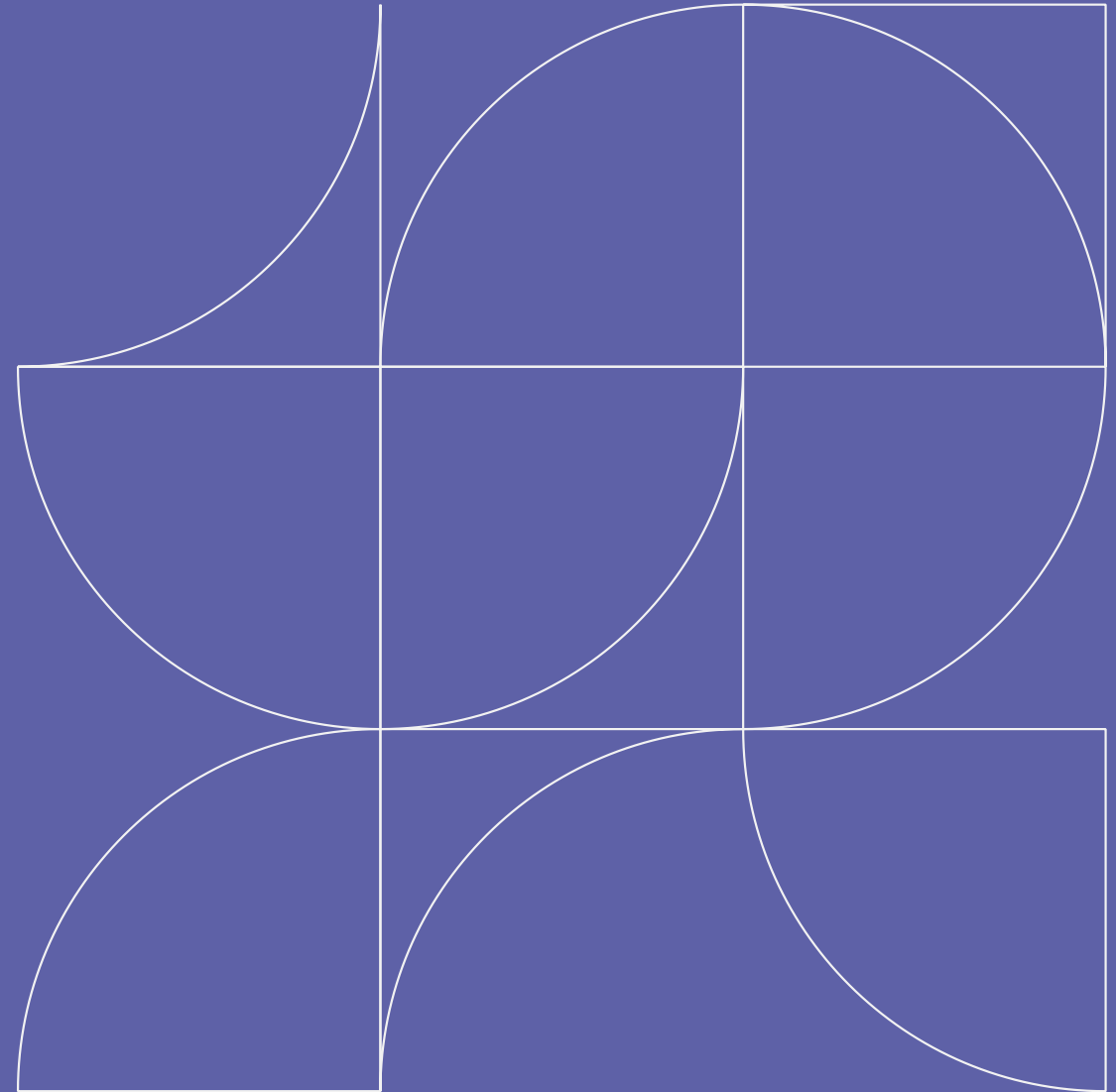
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- **Marggieh Dicarolo v. MoneyLion, Inc., et al Ninth Circuit**

The Ninth Circuit panel affirmed the district court's conclusion that the Agreement's arbitration provision was valid and enforceable because it allowed public injunctive relief in arbitration and therefore did not violate California's *McGill* rule. The Agreement authorized the arbitrator to award all injunctive remedies available in an individual lawsuit under California law. DiCarlo argued that she could secure public injunctive relief only by acting as a private attorney general, which the Agreement explicitly prohibited. The panel, however, held that public injunctive relief under California's UCL, FAL, and CLRA is available in an individual lawsuit without a plaintiff acting as a private attorney general.

In California, litigants proceeding in individual lawsuits may request public injunctive relief without becoming private attorneys general. That means that public injunctive relief is available to DiCarlo in arbitration with MoneyLion. Since the arbitration provision does not violate the *McGill* rule, it is valid.

# Latest Decisions and Trends Involving Live Sports, Entertainment, and Recreation



# Covid Refund Class Action: **Big Picture**

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- **Explanation of Claims**

- Claims: Breach of Contract, Unjust Enrichment, Conversion, Unfair Business Practices
- Defenses: No breach / no promise, credit for proration, other services, class challenge, sovereign immunity

- **Immediate Activity**

- Many class action suits filed before decisions for future events or services are made
- Differences in claims (fees vs. value), venue (state vs. federal), arguments

- **Different Industry Approaches**

- Full (or partial) refunds, immediate or with a Term
- Credit for future events or services (same or different)
- Bankruptcy or No Action



# Latest Decisions and Trends Involving Live Sports, Entertainment, and Recreation

## Covid-Related Actions Against Sports Organizations

- **Unique Features:**
  - Ordinary Use of Revenue and Cash Flow (unavailability of funds paid in advance)
  - Overriding desire for customer “connectivity” and brand loyalty
- **Example: Major League Baseball** (and each of its teams and official ticket partners)
  - Filed asap (before plans), in CA (Pltf’s from NY), phased response team-by-team
  - Argument: Each party knew or should have known that the games were cancelled immediately – therefore holding advanced payments as an interest free loan.
- **UPDATE: Motion to Dismiss granted for teams who gave full refunds or credits**
  - Also, findings of Lack of Personal Jurisdiction and Compelling of Arbitration
    - But other Leagues not so lucky, BK (“*Welcome to the Rock*”) and worse

## Covid-Related Actions Against Concerts/Festivals

- **Unique Features:**
  - Non-refundable deposits, building materials, staffing complicates use of funds
  - Differences in size, scale, and locations
- **Examples: Coachella, SXSW, Lightning in a Bottle**
  - Full refund (Coachella) vs. Credit (SXSW) or No Refund (LB) – Litigation for 2
  - Dependant on ability to provide refunds and certainty for future
    - BK and repackaging alternative even more of a potential reality
- **UPDATE: Talent Agency and Virgin Mobile Festival**
  - Suit over Pre-paid artists fees (“otherwise ready and able to perform”)
  - Ruling: Dispute as between the artist and the festival (not the agency)

# Latest Decisions and Trends Involving Live Sports, Entertainment, and Recreation (Continued)

## Covid-Related Actions Against Ticket Brokers

- **Unique Features:**
  - Some official ticket platforms of leagues / events; Some secondary / tertiary
  - Contracts with team / event vary re: process and retention of advanced payments
- **Examples: MLB Family, Ticketmaster, Vivid**
  - Disputes over “postponement v. cancellation”
  - Language of Terms and Conditions important
    - Refund policy and Arbitration agreements
- **UPDATE: Vivid Settlement for retroactive discontinuation of refund policy**
  - Reservation of rights to compel arbitration and proceed individually
  - Limitation of Damages (price paid, and potential reduction if overstretched)

## Covid-Related Actions Against Memberships & Clubs

- **Unique Features:**
  - Advanced payments for annual memberships / Automatic monthly payments
  - Private / Exclusive vs. For-Profit Public vs. Partnership-based Access
- **Examples: Ski Mountains, Theme Parks, Golf/Social Club Operator and Partner**
  - Ski Mountains: Refund contingent on entering into new contract
  - Theme Parks: Bevy of Options, practical realities, and litigation
  - Social Clubs: Guaranteeing access to third parties (see Gyms, local differences)
- **UPDATE: Motion to Dismiss Denied for Largest Golf/Social Club Operation in US**
  - Continuation of automatic withdrawals and lack of refund (threat of BK)
  - Issue of individual club bylaws being incorporated by reference (arbitration)

# Latest Decisions and Trends Involving Live Sports, Entertainment, and Recreation (Continued)

## Covid-Related Actions Against [Higher Education](#)

- **Unique Features:**

- Providing a mix of services in addition to education (health, social, etc.)
- Pre-existing blend of virtual teaching and learning prior to the pandemic

- **Examples: Copycat Actions and the Temple Two-Step**

- Out of state counsel filing action with use of local counsel (well over 150 total)
- Lawsuit #1: Refund on tuition, diminished value of remote learning
- Lawsuit #2: Refund of fees, direct and indirect

- **UPDATE: Motions to Dismiss Granted / Unique Public Issues**

- Different results on similar facts, Rutgers and Ball State
- UC Systems Sovereign Immunity; Univ of Arizona lack of notice



# How to Prevent and/or Defend These Class Actions

- **Best way to avoid class action litigation is to provide a full refund**
  - But no guarantees, and time is of the essence
- **Revisit traditional uses of cash flow and advanced payment obligations**
  - Retain additional revenue almost as self-insurance against now-foreseeable risks
  - Those without the ability or willingness to provide a full refund must consider suspension of payments, rollover refund policies, and other future offers
- **Terms and Conditions and Class Action Waivers / Arbitration Agreements**
  - If terms and conditions spell out remedy, versus “changed term”
  - Enforceability of Arbitration Agreements key (differences in venue, CA vs other)
- **Force Majeure and its common law arguments** (equitable in nature)

- **Resolving customer issues on a case-by-case basis**
  - Helps with customer satisfaction and with potentially defeating class certification
- **Offer multiple alternatives**
  - Helps with customer satisfaction and connectivity
  - Helps with defeating class claims and class certification
- **Track customer utilization with additional technologies**
  - Helps with customer connectivity, with class certification, and damages tracking
- **Customer usage data used to identify differences**
  - Helps with customer connectivity, with class certification, and damages tracking

## **Business & Legal Considerations for Other Offerings**

## What to Expect: Trends in Such Commercial Class Actions

- **Diminished value of offering**
  - Reduced capacity
  - Reduced available hours
- **Diminished value or Failure to provide redemption of credits**
  - Altered offerings
- **Failure to accommodate health and safety concerns** (disability discrimination)
  - Health preconditions and health sensitivities differ, by person and by locale
- **Forum Shopping** – California, Here We Come

**thank  
you**

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