

Privacy Litigation Trends – Back to the Future

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Plaintiffs look to the past to take action against modern web tracking

As states rapidly enact new consumer privacy legislation, businesses have been working tirelessly to comply with extensive new data protection obligations and build out compliance programs. Despite the fact that these new state laws lack a private right of action for violations associated with online tracking and data sharing, private plaintiffs across the country have found creative workarounds, filing a wide range of novel claims alleging violations of decades-old privacy laws. These claims seek to expand the reach of these older laws to modern technologies, adding a new, dynamic layer to businesses' privacy concerns.

Driving the explosion in litigation are a series of decisions that have given new life to claims under state and federal wiretap laws and for violation of state constitutional common law privacy rights in the context of common online technologies. As a result, private plaintiffs are increasingly bypassing the broad limitations on private rights of action common to state consumer privacy laws, and making demands that go beyond, or potentially conflict, with the requirements set out in those laws.

For now, many of these actions are relatively novel claims working through lower courts, often on preliminary motions. The causes of action and defenses continue to evolve, and there remains considerable change and uncertainty as these cases develop. However, recent trends suggest that courts are engaging in critical and nuanced evaluations of these claims in the context of popular online advertising and communications technologies.

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