

Managing Risk in Privacy and Data Breach Litigation: Practical Defense Strategies





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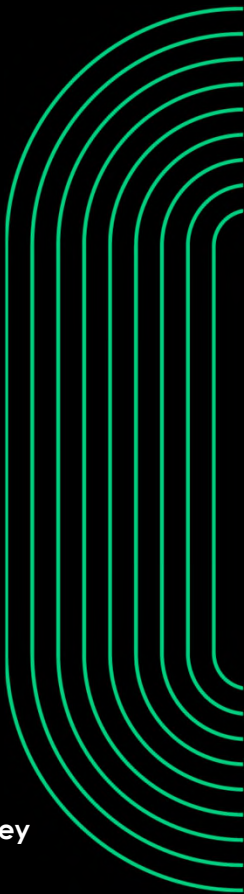
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Business Legal Services
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ASSET360

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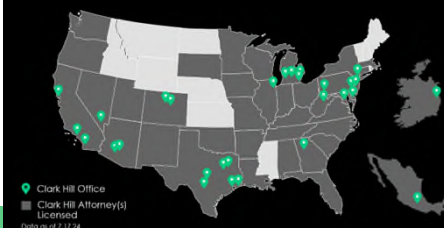
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eDiscovery project management and data compliance

Clark Hill Public Strategies

Government relations, lobbying, and regulatory consulting



Agenda

1. Data Breach Lawsuits

- a) Protections and Pre-Suit Tips
- b) You've Been Served – Now What?
- c) Beating the Complaint & Options for Resolution

2. Privacy Lawsuits

- a) Protections and Pre-Suit Tips
- b) You've Been Served – Now What?
- c) Beating the Complaint & Options for Resolution

3. Threat Actor Trends

- a) Proactive Protection

4. Questions





Data Breach Lawsuits



Protections and Pre-Suit Tips

- Notice Letter Language
 - AG / FBI IC3 Reporting
 - “May” “Potentially impacted”
 - Specify Data Elements
 - Careful use of exfiltration language
- Population Size Determined Early
- Scope/ Type of Information
- Third-Party Forensics (root cause)
- Engage legal counsel early and preserve evidence immediately after an incident



You've Been Served – Now What?

- Notify legal counsel and cyber insurance carrier immediately
- Issue a litigation hold
- Determine pleading deadlines
 - State versus Federal nuances
 - The benefit of local counsel
 - Extending time to respond
- Opposing Counsel
- Plaintiff Letters
- Dark Web Searches
- Opportunities for early resolution



Beating the Complaint & Options for Resolution

- Federal versus State Court
 - CAFA
 - Importance of population size and location
- Challenge standing, causation, or damages at the motion-to-dismiss stage
- Consider early resolution options (settlement, mediation) to control cost and risk
 - Class settlement
 - Claims Made
 - Common Fund
 - Individual Settlement



Defenses

- Standing/Injury – Still the biggest and best tool for favorable resolution
 - *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) – Concrete injury, not just violation of statute – also future harm not sufficient for damages only injunction
 - Imminent Risk of Identity Theft/Fraud -- Was breach result of intentional act? -- Type of data -- Accessed vs. Exfiltrated
- Causation/Traceability
 - Allegations of time and sequence are insufficient
 - Must be some connection to data incident at issue (e.g. type of information)
 - Impact of other breaches
- Subject Matter Jurisdiction
 - Removal under CAFA
 - Lack of Diversity Jurisdiction



Evaluating Damages

Key Drivers for Settlement

- Class Size
- Financial Ability
- Precedent

Key Considerations for Insurers

- Forensic reports/analysis
- Historical financial performance
- Data breach response cost
- Reputational damages
- Period of recovery
- Mitigation efforts





Privacy Lawsuits



Privacy Lawsuit Types

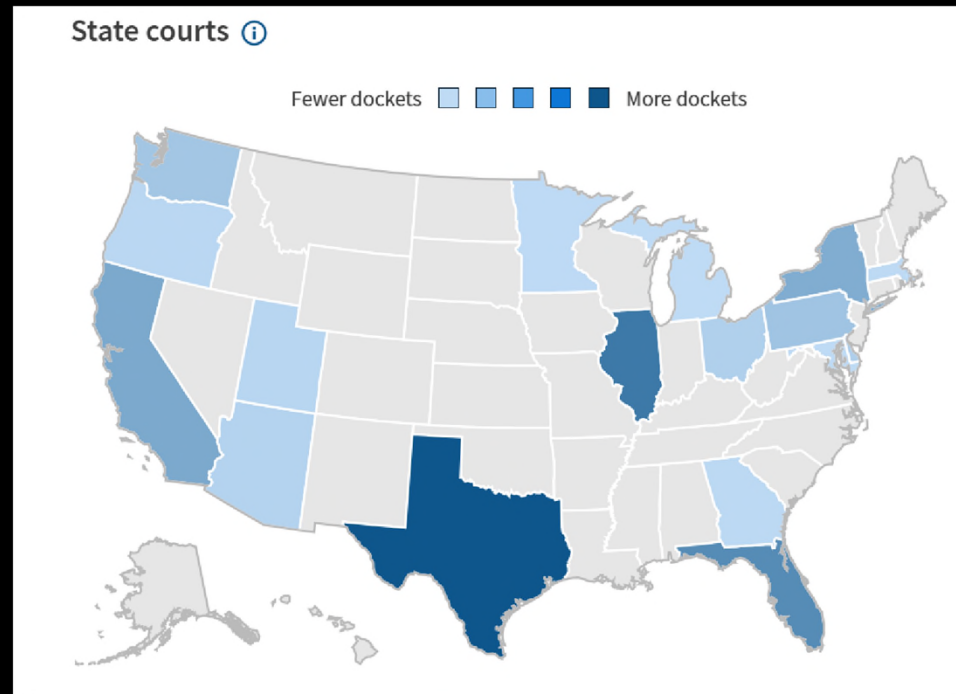
- Class Action Areas
 - BIPA
 - CIPA
 - Pixel/Tracking (including ECPA and Wiretap claims)
 - Trap and Trace
 - VPPA
 - GIPA
 - AI



Statistics – Data Privacy Claims

- **Top 5 States For Filing:**

1. Texas
2. Illinois
3. Florida
4. California
5. New York



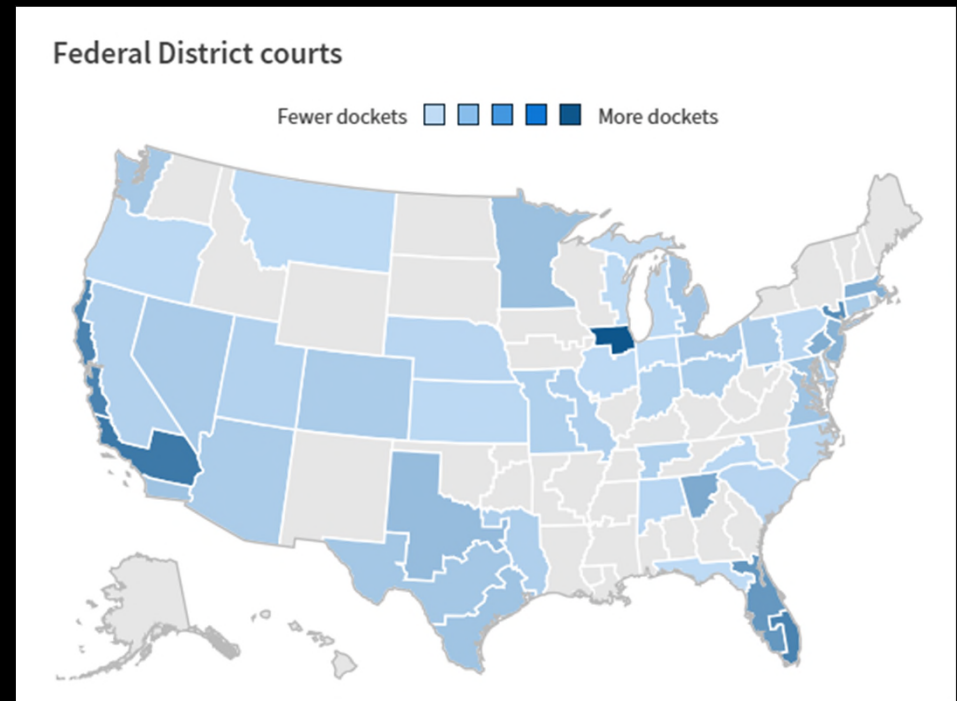
Based on Westlaw's Categorization of Lawsuits as "Data Privacy" claims (under Intellectual Property and Technology) (through January 23, 2026)



Statistics – Data Privacy Claims

- **Top 5 Federal District Courts For Filing:**

1. Northern District of Illinois
2. Central District of California
3. Southern District of Florida
4. Northern District of California
5. Southern District of New York

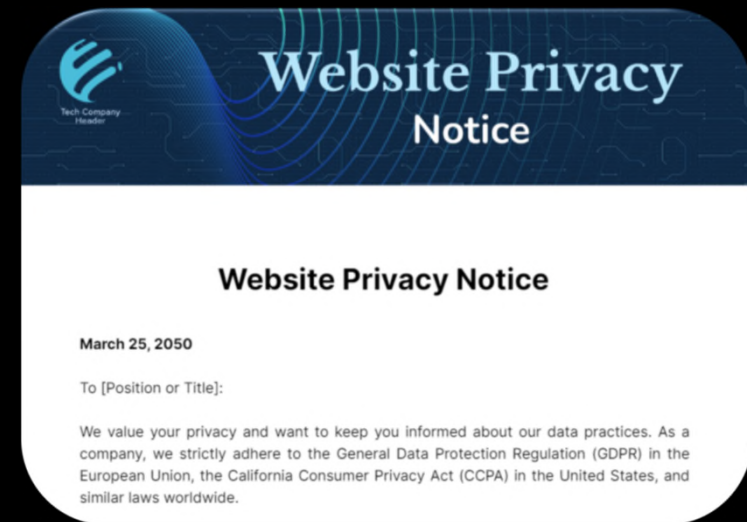


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Protections and Pre-Suit Tips

- Update privacy/cookie notices and policies, arbitration clauses, and class action waivers where enforceable.
- Audit data collection, consent, retention, and vendor practices for statutory and contractual compliance.
- Preserve contracts, policies, logs, and consent records to support early defenses.



You've Been Served – Now What?

- Notify legal counsel and cyber insurance.
- Determine pleading deadlines.
- Analyze statutory elements, jurisdictional issues, removal options, and potential contractual (arbitration/class action waiver) bars immediately.
- Implement a targeted litigation hold covering data flows, vendors, and policy and code changes.



Beating the Complaint & Options for Resolution

- Motion to Dismiss (besides elements)
 - Standing
 - Extraterritoriality
 - Statute of limitations
 - Consent
- Potential challenges to class certification: ascertainability, predominance, manageability, and individualized consent.
- Evaluate early resolution.
- Note: certain jurisdictions push these cases faster





Threat Actor Trends



Threat Actor Trend



- **2023 Statistics**

- FBI 2023 Internet Crime Report
 - IC3 received 880,418 complaints
 - Adjusted losses over \$12.5 billion

- **2024 Statistics**

- FBI 2024 Internet Crime Report
 - IC3 received 859,532 complaints
 - **Adjusted losses over \$16 billion**
(A 33% INCREASE FROM 2023)

Threat Actor Trends

- Business Email Compromise
- Phishing/Spoofing
- Ransomware

2024 CRIME TYPES *continued*

BY COMPLAINT LOSS

Crime Type	Loss	Crime Type	Loss
Investment	\$6,570,639,864	Extortion	\$143,185,736
Business Email Compromise	\$2,770,151,146	Lottery/Sweepstakes/ Inheritance	\$102,212,250
Tech Support	\$1,464,755,976	Advanced Fee	\$102,074,512
Personal Data Breach	\$1,453,296,303	Phishing/Spoofing	\$70,013,036
Non-Payment/Non-Delivery	\$785,436,888	SIM Swap	\$25,983,946
Confidence/Romance	\$672,009,052	Overpayment	\$21,452,521
Government Impersonation	\$405,624,084	Ransomware *	\$12,473,156
Data Breach	\$364,855,818	Harassment/Stalking	\$10,611,223
Other	\$280,278,325	Botnet	\$8,860,202
Employment	\$264,223,271	IPR/Copyright and Counterfeit	\$8,715,512
Credit Card/Check Fraud	\$199,889,841	Threats of Violence	\$1,842,186
Identity Theft	\$174,354,745	Malware	\$1,365,945
Real Estate	\$173,586,820	Crimes Against Children	\$519,424
Descriptor**			
Cryptocurrency	\$9,322,335,911		



Proactive Protection

- **People & Process**

- Train staff to spot red flags (urgency, unusual requests)
- Verify payment or data changes via a separate channel
- Enforce dual approval and clear incident response steps



Proactive Protection

- **Technology**

- Enforce MFA
- Use email filtering and anti-spoofing
- Monitor logins, email rules, and unusual activity

- **Email Hygiene**

- Restrict auto-forwarding rules
- Inspect links and attachments before opening





Questions? Thank You!

Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.