



# California Website Owners:

**Key Updates on Cookie Banners,  
Arbitration, and Privacy Compliance**

September 10, 2024

**Seyfarth Shaw LLP**

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# Speakers

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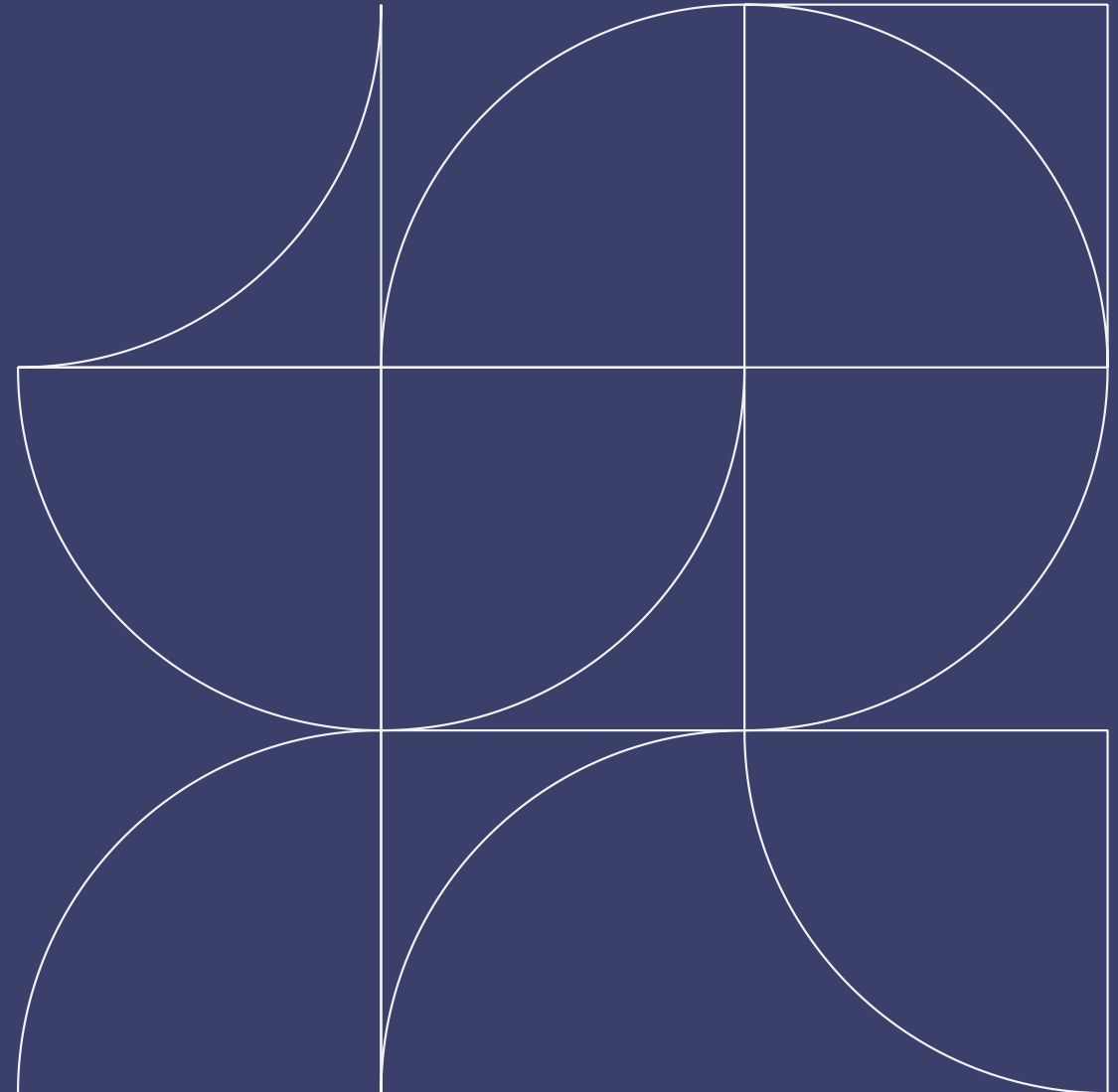
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# Agenda

- 1 | CIPA – History, Scope, and Damages
- 2 | The Intersection of CIPA and other Privacy Regulations
- 3 | Website Tracking Technologies
- 4 | Recent Trends and Cases
- 5 | Defenses – Practical Implications & Cookie Banners
- 6 | Positioning Your Organization for Success
- 7 | Arbitration Considerations

# CIPA – History, Scope, and Damages







## Background

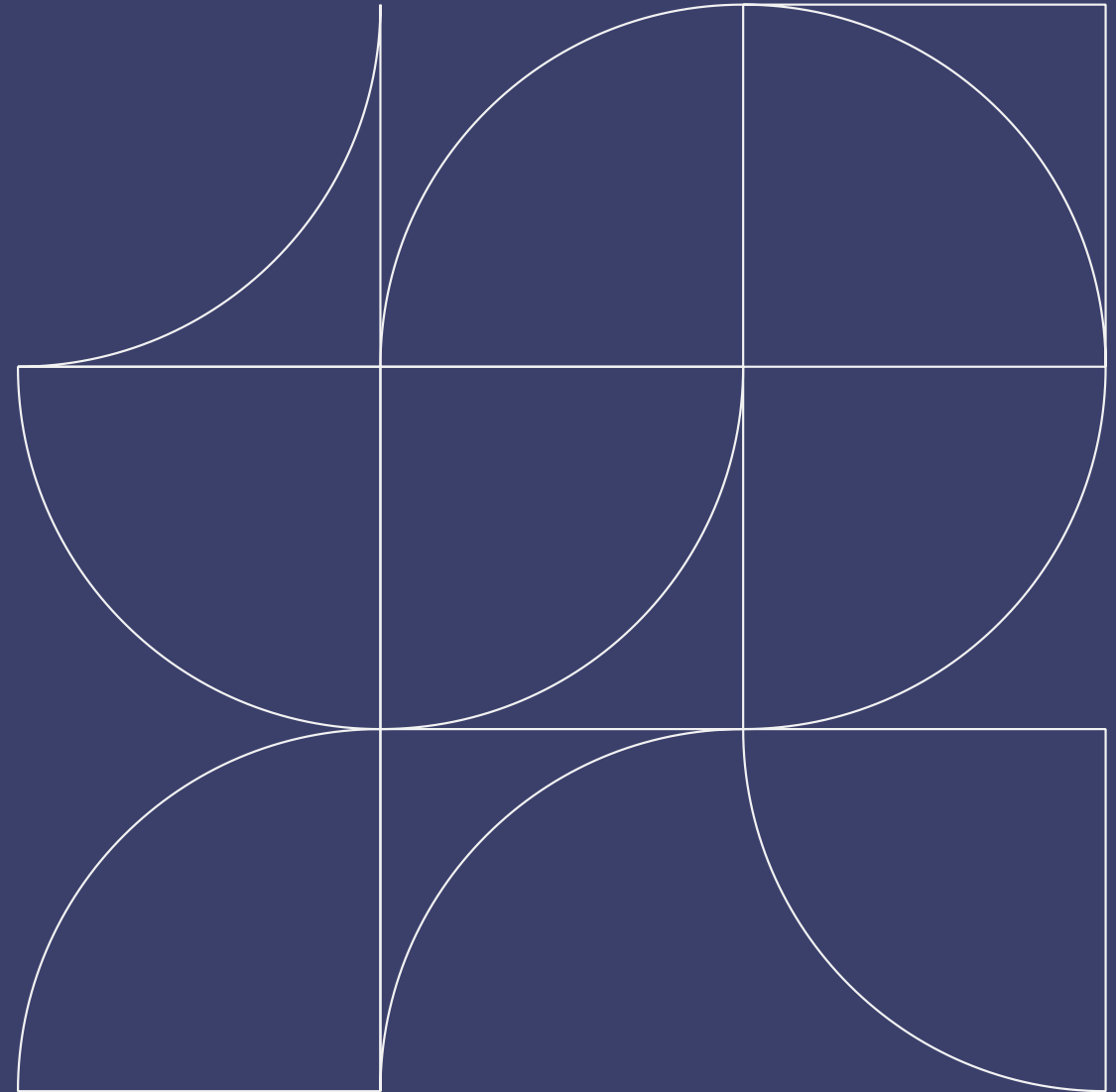
- There has been a massive increase in lawsuits under the California Invasion of Privacy Act
  - Any company with a website can be a target, with most of the claims currently targeting the operations of cookies, pixels, chatbots, pen registers and tracking software
  - Given the risks to platforms, everyone needs to be aware of these requirements, especially because the exposure can be significant – liability up to \$5,000 per violation (which can be any time a user comes to the company website), and no showing of actual damages are required
- Thousands of lawsuits filed, and demand letters served in California within the last year alone
- Similar claims in other states, including Florida, Illinois, Massachusetts, New York and Pennsylvania



## Applicable Law & Potential Damages

- Based on penal code sections developed with telephone and telegraph communications in mind
- Under the California Invasion of Privacy Act, it is illegal to intentionally record or eavesdrop on communications without the consent of all parties. This also includes anyone who aids, agrees with, employs, or conspires with any person to carry out such recording or eavesdropping
  - California Penal Code section 631: third party wire-tapping and in-transit interception
  - California Penal Code section 632: monitoring or recording confidential communications
  - California Penal Code section 632.7: recording of wireless communications
  - California Penal Code section 638.51: recording of wireless communications
  - California Penal Code section 637.2: \$5,000 statutory damages per violation (e.g., each visit to the website) or three times actual damages; private right of action; no actual damages necessary

# The Intersection of CIPA and Other Privacy Regulations



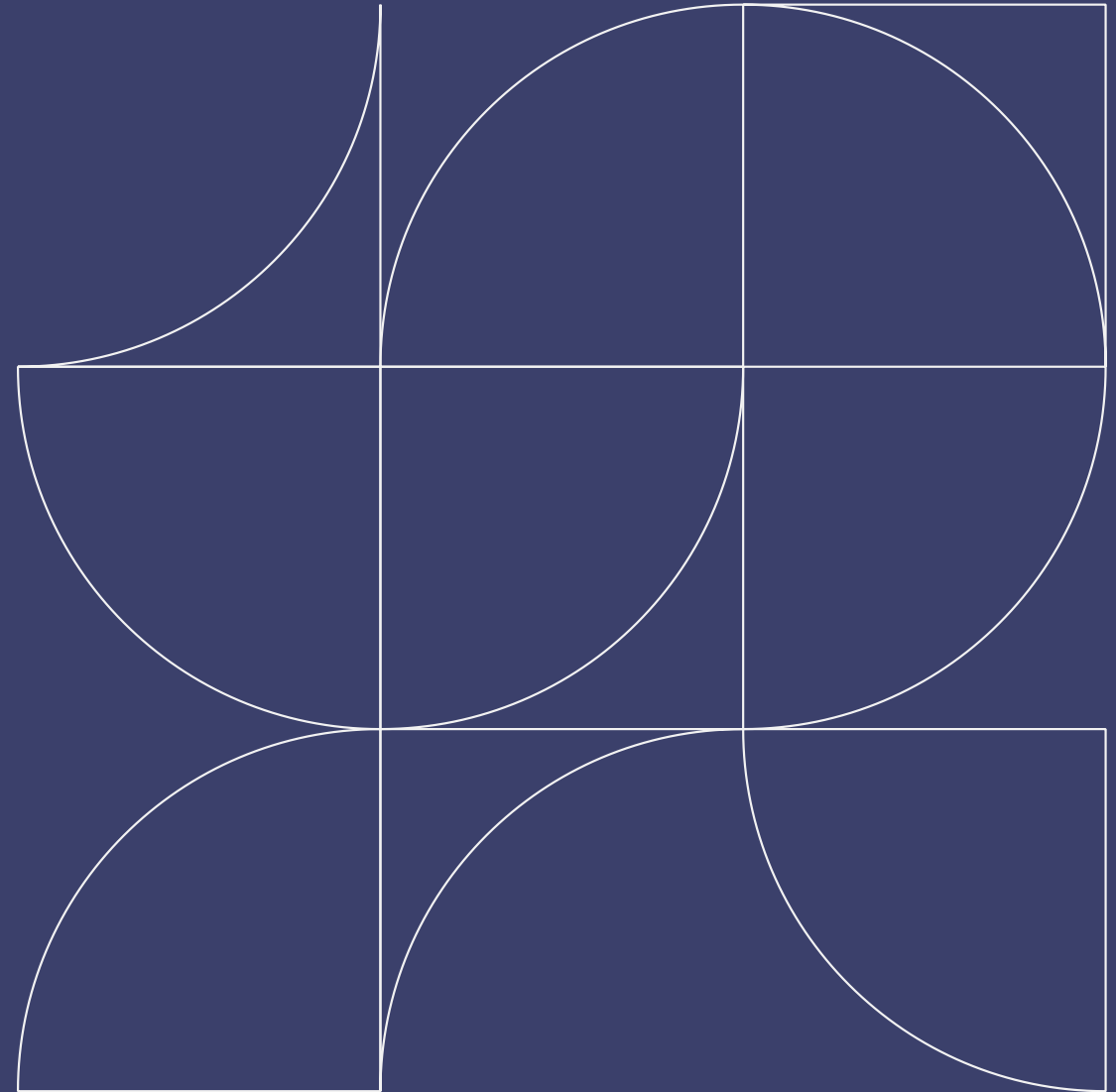




## **Applicable Law & Potential Damages/Enforcement (CPRA / Other States / Differences from EU Regs)**

- Numerous states with state level privacy laws, including California, Colorado, Connecticut, Delaware, Iowa, Indiana, Kentucky, Maryland, Montana, Nebraska, New Hampshire, New Jersey, Oregon, Tennessee, Texas, Utah and Virginia
- No private right of action under the CCPA/CPRA, but enforcement actions may be brought by the California Attorney General or the California Privacy Protection Agency
- Fines of \$2,500 per violation or \$7,500 per intentional violation
- 2022 California AG Lawsuit Against Sephora - \$1.2 million settlement
- Note: While the combination of CIPA & CCPA has a lot of similarities to the EU Regs, there are some notable differences, such that compliance for EU purposes will not necessarily equate to compliance with CIPA / CCPA

# Website Tracking Technologies

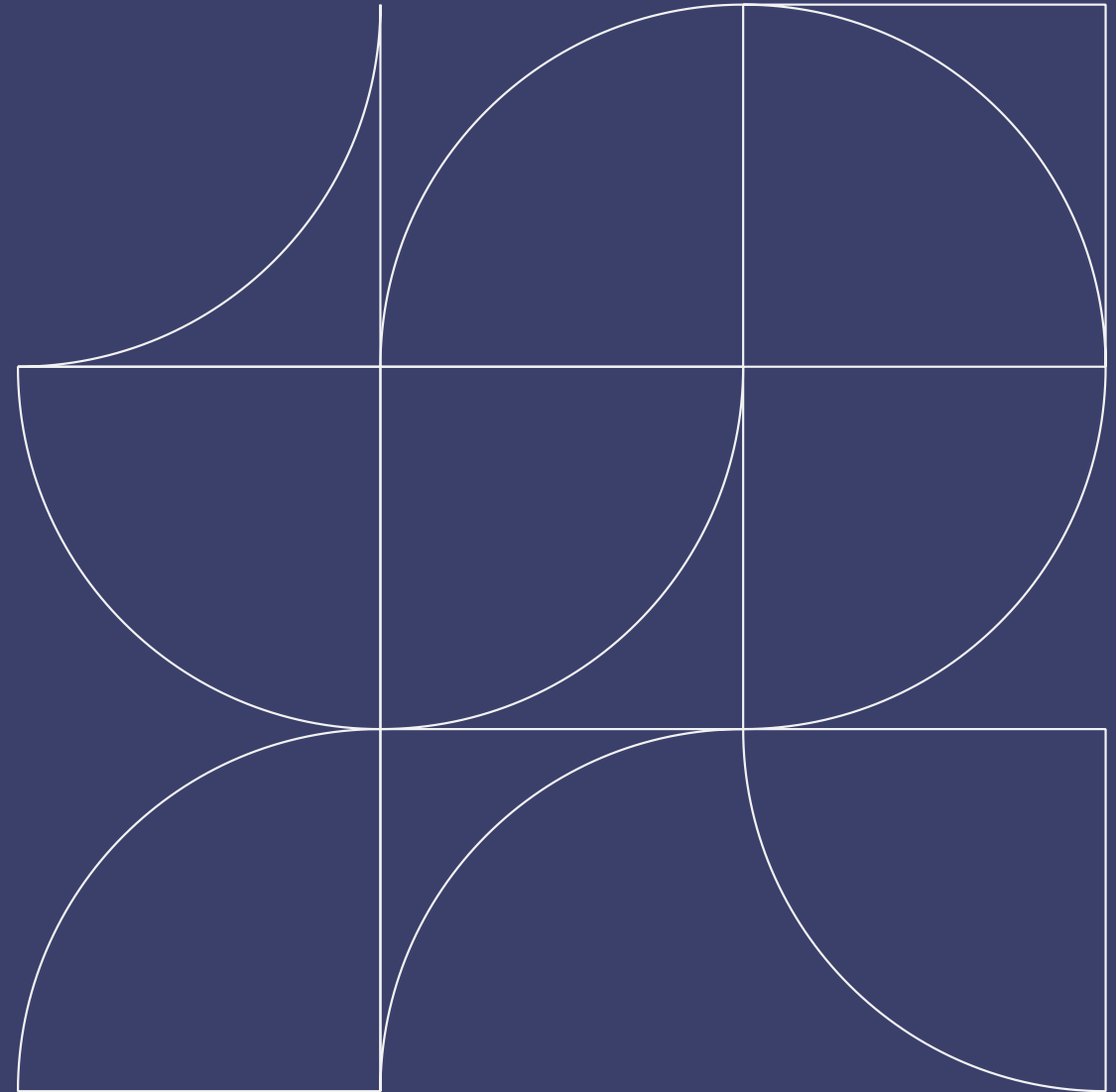




## Website Tracking Technologies

- What can cookies, pixels, web beacons, etc., do?
  - Collect; Track & Follow; Contribute to Profiles
  - Necessary / Performance / Functional / Targeting & Advertising
  - Can Facilitate:
    - cross-contextual behavioral advertising
    - selling and sharing
- Chatbots (live and automatic/AI)
  - Recordings
  - 3<sup>rd</sup> party data sharing
  - Use of information collected through Chatbot
- Doxing/Deanonymization
- Session Replay
- Search Terms

# Recent Trends & Cases



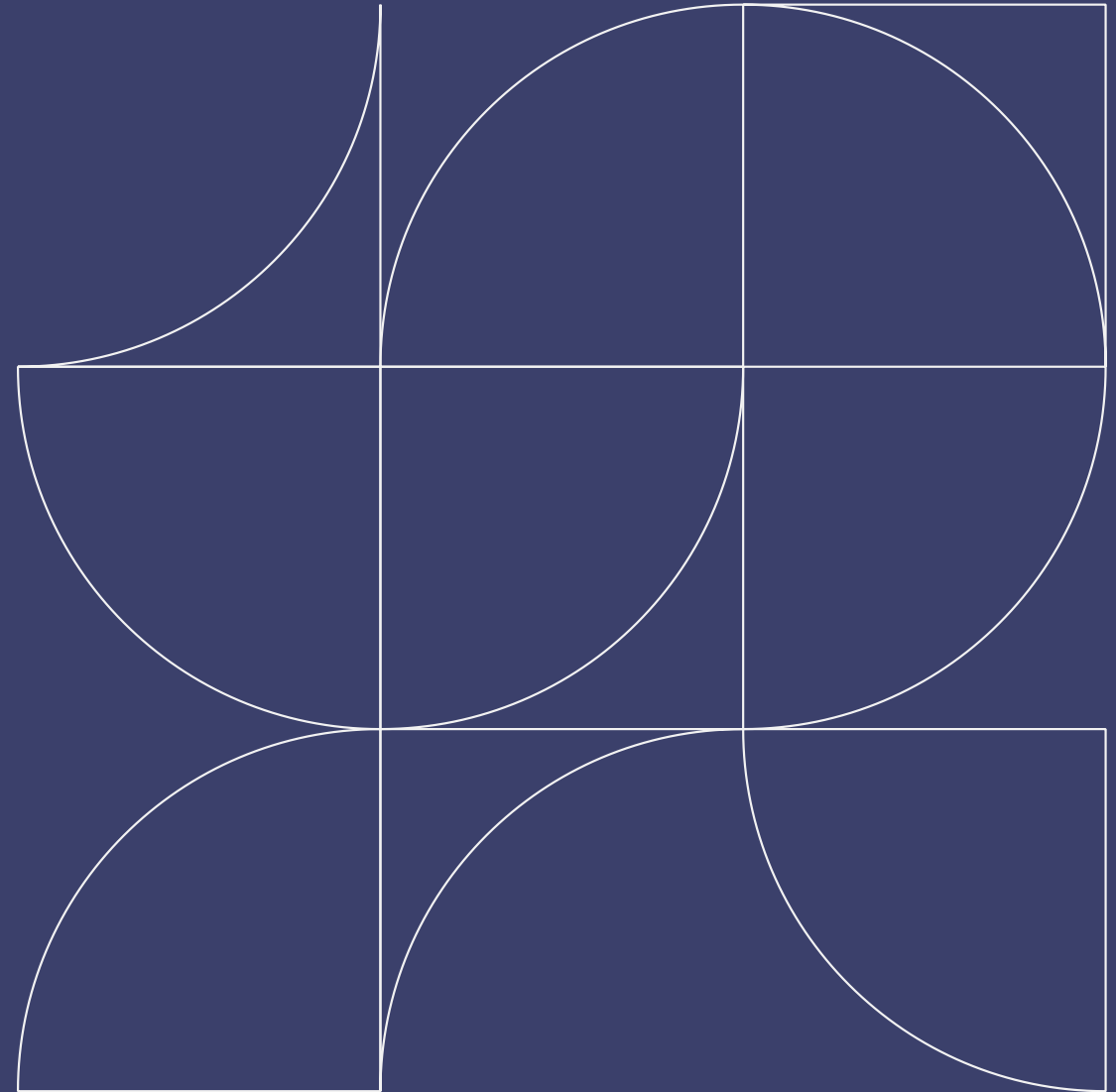




## Recent Cases / Trends

- Applicability of CIPA to Internet Communications:
  - *Javier v. Assurance IQ, LLC*, (9th Cir., May 31, 2022)
    - Court held that when “interpreted in light of the broad privacy-protecting statutory purposes,” CIPA applies to internet communications.
- Pen Registers / Trap & Trace Devices (California Penal Code section 638.51)
  - *Greenley v. Kochava* (S.D. Cal; July 27, 2023)
  - Mixed California State Trial Court Decisions:
    - *Licea v. Hickory Farms*, 2024 WL 1698147 (March 13, 2024)
    - *Levings v. Choice Hotels*, 2024 WL 1481189 (April 3, 2024)
    - *Moody v. C2 Educational Systems Inc.* 2024 WL 3561367 (July 25, 2024)
- Chatbots
  - *Byars v. Goodyear Tire & Rubber Company* (C.D. Cal; Feb. 3, 2023)
  - *Swarts v. Home Depot*, 2023 WL 5615453 (N.D. Cal; Aug. 30, 2023)
- Compliance with Cookie Banner Choices
- Mass Arbitration Considerations

# Defenses – Practical Considerations & Cookie Banners

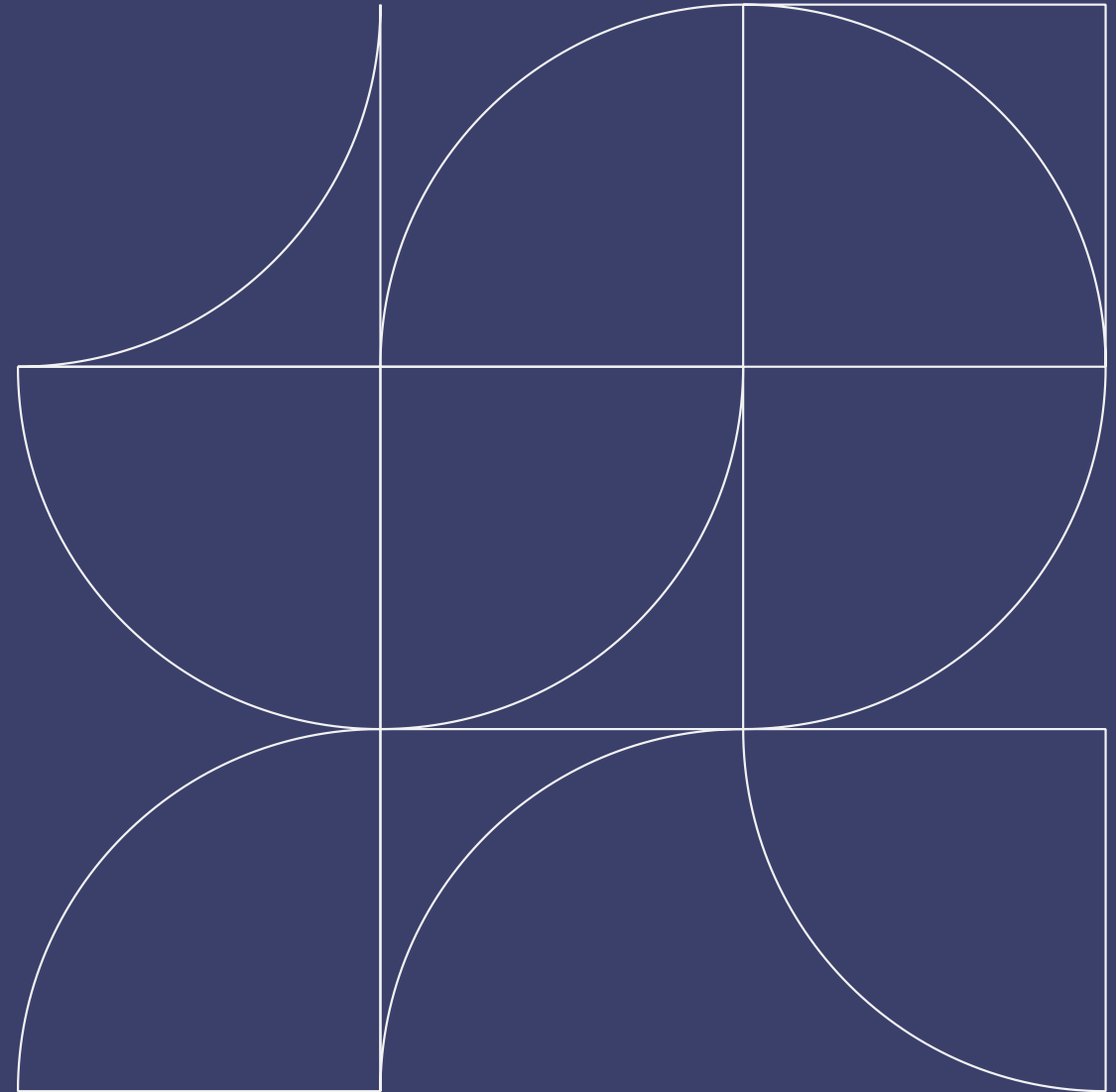




## Defenses

- 12(b)(6) Motion – Failure To State a Claim
  - Minimal Success: *Licea* decision
- Lack of Personal Jurisdiction
- Improper Venue / Compelling Arbitration
- Third Party Considerations
- Lack of Injury
- Professional Plaintiffs
- Consent
  - Best Practice: have the user click a button consenting to the data collection
  - Good Practice: include language warning that if they continue using the site and/or chat bot feature, that further usage constitutes consent

# Positioning Your Organization for Success





# Positioning Your Organization for Success

- Cookie Banner Considerations:

- Do you have one in place?
- What type of management options do you want to provide?
- What cookies and pixels are operating on each and every page of the website?
- At what point does the transmission take place?
- Do your privacy notices and policies fully and accurately disclose your operative cookies, pixels, and any other third-party data sales/sharing?

- Chatbot Considerations:

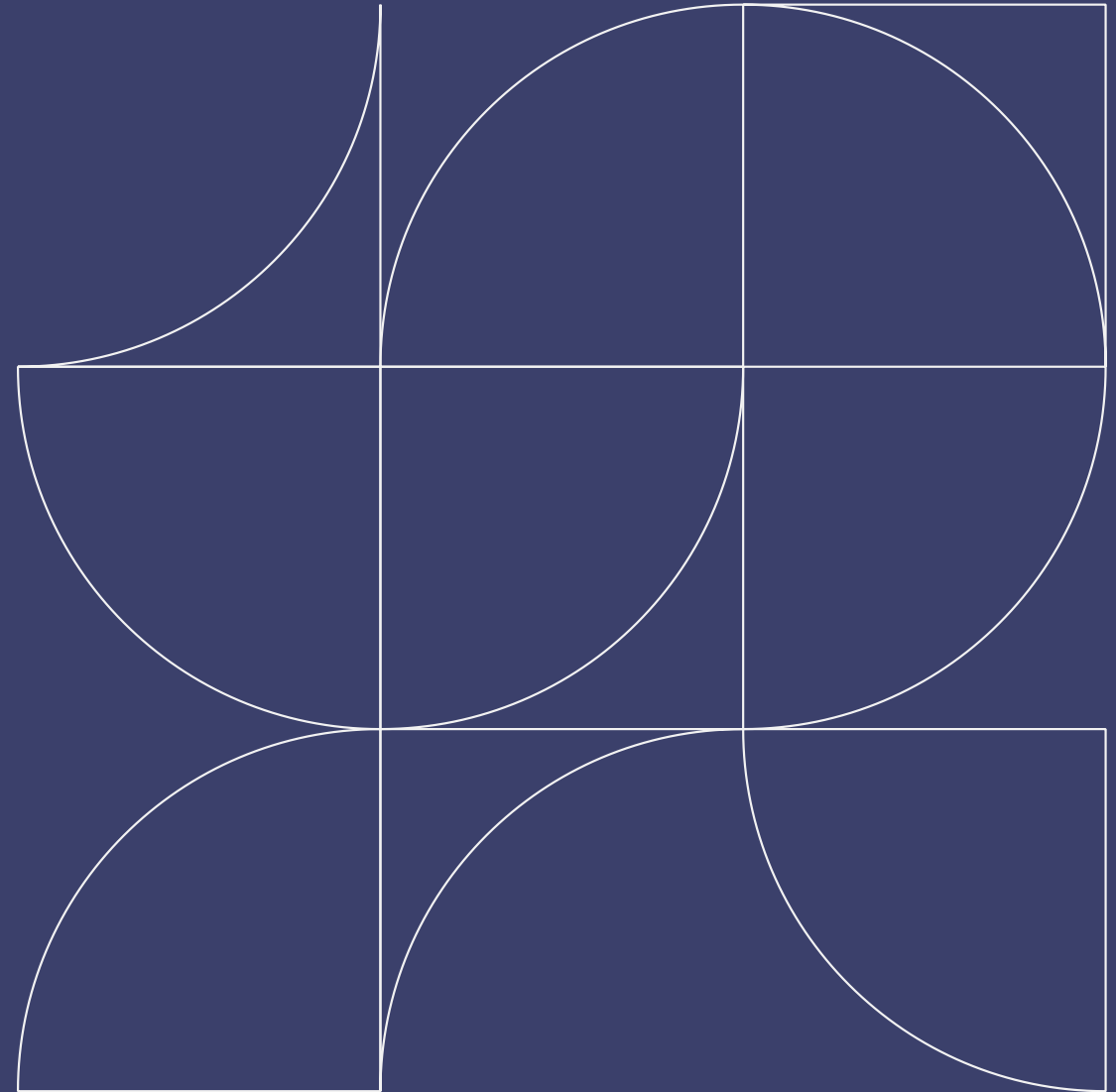
- What disclosures do you have in place, both in the Chatbot and in any related privacy policy?
- Hosted by a third party?

- Opt-Out Considerations:

- Tested; functioning; global (GPC)?



# Arbitration Considerations





## Arbitration Considerations

- Do you want arbitration or a class action?
  - AAA or JAMS?
  - California default law considerations
- Can you compel arbitration?
  - *L'Occitane* strategy
- If you decide to keep your arbitration provision:
  - add pre-dispute requirements
  - add AAA / JAMS language
  - add rule 11
  - add requirement for claimants to sign documents
  - add descriptions of batching / bell-weather proceedings
  - add procedures for determining lead counsel and elimination of duplicate claims



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