

# Pixel Pandemonium

## Mitigating Legal Risks of Meta and Google Tracking Technologies

A joint presentation by GRSM's Cyber, Privacy and Data Security, and Advertising & eCommerce Practices  
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GORDON REES SCULLY MANSUKHANI  
YOUR **50 STATE** LAW FIRM™

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This presentation does not amend, or otherwise affect, the provisions or coverages of any insurance policy. Any discussion of coverages is about those generally available in the marketplace and is not based specifically on the policies or products of any particular carrier.



# What We'll Cover

- What is a pixel and how does it work?
- What are these cases about: Part 1 (Wiretapping)
- What are these cases about: Part 2 (The “kitchen sink” allegations)
- Do any of these claims have merit?
- What specific causes of action are being brought?
- Are they really claiming violations of wiretapping laws?!
- Preventing and Defending Claims
- Q&A



# What are these case about?

An (oversimplified) technical primer

**How the pixel really works**

**VS**

**How Plaintiffs allege it works**



# What they allege happens with the pixel...



User visits Company site



User enters data intended for use by Company



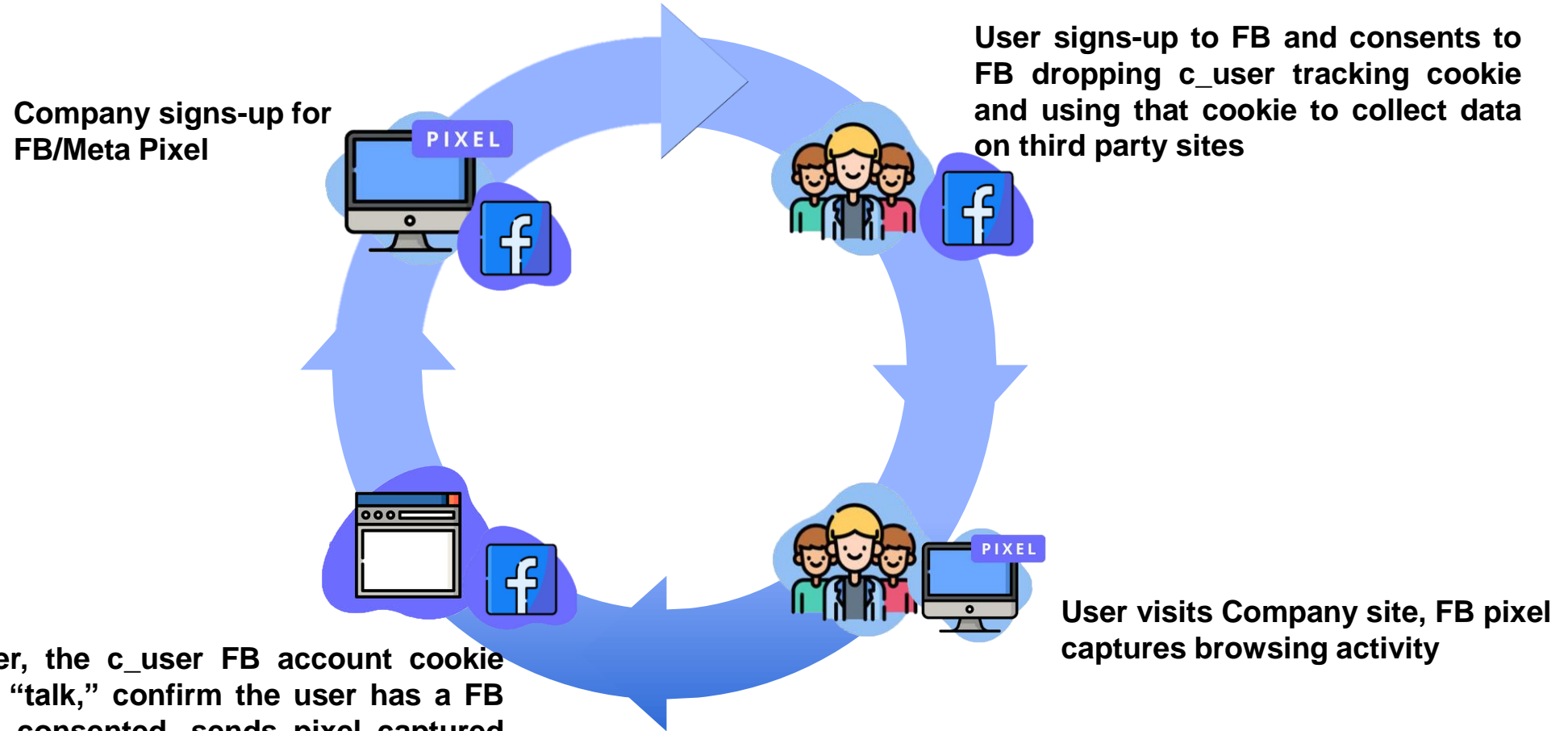
Company allows pixel to “intercept” data without ever warning the user\*



“Surreptitiously” intercepted data is sent to FB

\*plaintiffs are using the same theory with website chatbots

# What really happens with the pixel...



## **Are they really claiming violations of wiretapping laws?!**

Yes. Wiretapping claims are often the core point of entry for a substantial portion of these claims with the personal data/privacy being companion or secondary.



# Understanding Wiretapping Claims

## The Rise Of The Self-Tapping Website? State Wiretapping Class Actions Take Off After Two Recent Circuit Court Decisions

by: Adam D. Bowser of ArentFox Schiff LLP - Perspectives/Alerts

Posted On Monday, December 10, 2023

Privacy Class Actions Continue to Evolve: New Approaches

Papa John's sued for 'wiretap' spying on website mouse clicks, keystrokes

When the tracking hits your eye like a big pizza pie, that's a priori

Thu 6 Oct 2022 // 20:20 UTC

[Brandon Vigliarolo](#)

Class of Wiretap Class Actions Plaintiffs Try New

Class Action Suits Alleging Wiretapping of Plaintiffs That Track User Activity Of Their





# The Landmark Incident in Wiretapping History



## 1965: The Martini Glass Incident

- 1965 Senate Subcommittee Hearing.
- Martini Glass: A Concealed Recording Device.
- Impact: A Wake-Up Call Leading to Wiretapping Law Revisions

## Why wiretapping? It seems so archaic.

- Statutory damages – allow Plaintiffs to avoid a potential lack of actual damages problem
- Sets up plaintiff's negotiating leverage – the “per claim” nature of statutory damages let's plaintiff get to big numbers quickly e.g., \$1,000 x 1,000,000 site visitors = \$1B



# Modern Wiretapping Claims and Their Categories

## Health related claims

- Claim alleges handling highly confidential data was shared with Meta via URLs.
- Typical defendant: hospitals, health providers.
- Focus: Have cookies been used inside a health portal or otherwise?

## Chatbot Claims

- Claims against use of chatbots by businesses.
- Issues: Chatbots recording conversations without consent.
- Focus: Scrutiny on consent and disclosure practices.

## Session Replay Claims

- Claims against the use of 'session replay' cookies on websites.
- Function: Tracking user interactions and website navigation.
- Focus: Is the individual identifiable and does it count as content?

## General Cookie Claims

- Broad category involving standard web cookies but the focus is typically on Facebook.
- Issue: Cookies tracking user behavior without clear consent.
- Focus: Ensuring transparency and user choice in cookie use.

# What specific causes of action are being brought?

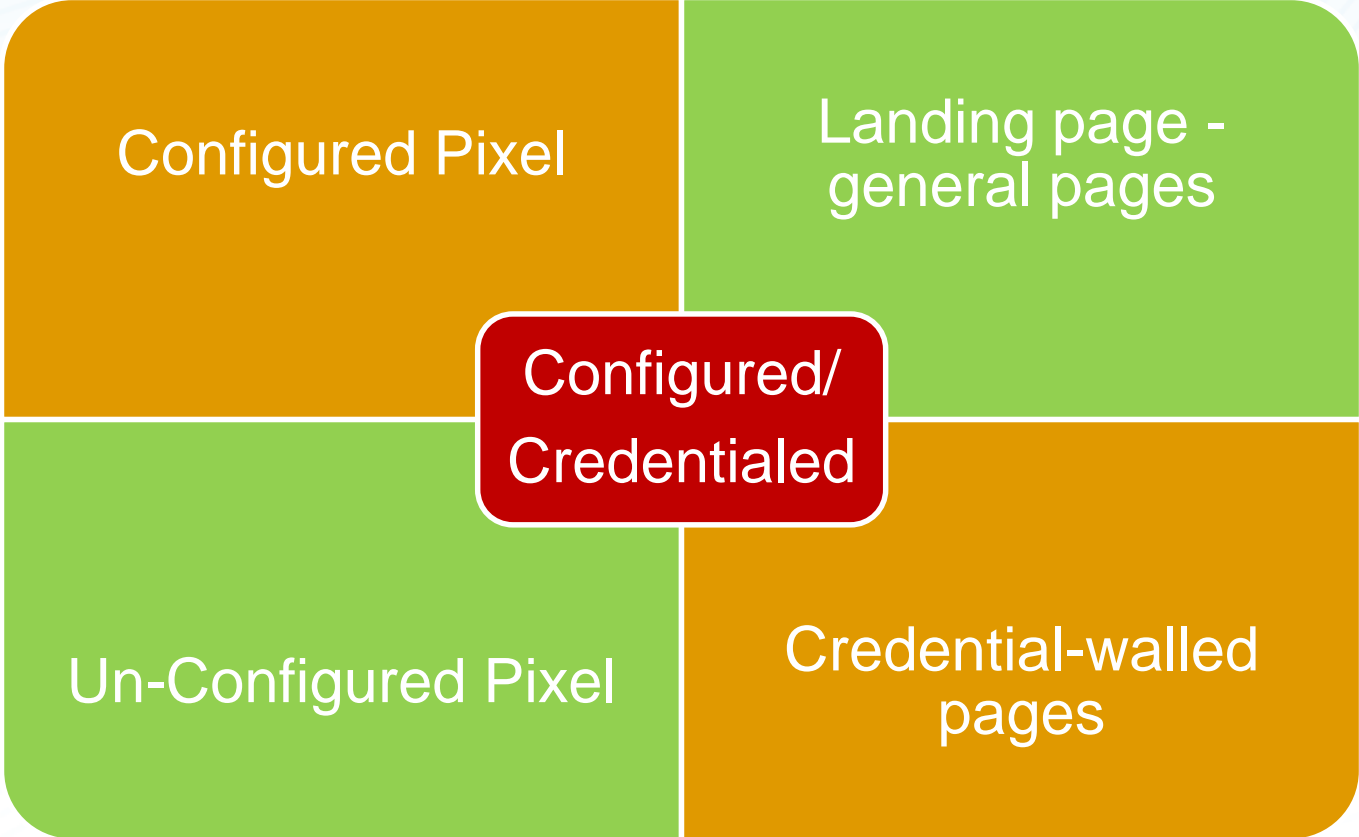
- Negligence & Negligence *per se*
- Invasion of Privacy
- Breach of Implied Contract
- Unjust Enrichment
- Breach of Confidentiality
- Breach of Fiduciary Duty
- State Consumer Fraud/Deceptive Business Practice Act Claims
- Health Insurance Portability and Accountability Act
- Video Privacy Protection Act
- Computer Fraud and Abuse Act
- Federal Wiretap/Eavesdropping Act and State Analogs

\*HealthCare v. Non-HealthCare Case Distinction



# Do the Pixel Claims Have Merit?

It depends on how and where you're using the pixel. . .



# Do the Claims Have Merit?

## Class Action Litigation: National Overview

- **Motions to Dismiss Met with Limited Success**
  - See e.g. In re Meta Pixel Healthcare Litigation – ND Cal.
- **Plaintiffs Bar Seeing Dollar Signs**
  - We're seeing same firms repeatedly/small firms collaborating
- **Cases Headed for More Protracted Litigation**
  - Statutory Damages are a Concern



# Preventing/Defending Claims

## 13. MANDATORY BINDING ARBITRATION AND CLASS ACTION WAIVER

Any dispute or claim between the parties arising from or relating to this Agreement or the Services shall be governed by the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16 and submitted to arbitration before a single arbitrator of the American Arbitration Association ("AAA") in accordance with the AAA's Commercial Dispute Resolutions Procedures, Supplementary Procedures for Consumer-Related Disputes. The arbitrator shall follow the substantive law of the State of California without regard to its conflicts of laws principles.

Notwithstanding anything to the contrary herein, you agree that [REDACTED] has the right to bring a claim against [REDACTED] state or federal courts in California for injunctive relief, equitable relief, or otherwise arising from any actual misappropriation or infringement of its intellectual property rights and you agree that venue is proper in any state or federal court in California. You are subject to personal jurisdiction in such forum.

You agree that any arbitration or proceeding shall be limited to the claims between us and you in the full extent permitted by law, (i) no arbitration or proceeding shall be joined with any other; (ii) you have no authority for any claim to be arbitrated or resolved on a class action-basis or to utilize class action procedures; (iii) there is no right or authority for any claim to be brought in a purported representative capacity of a general public or any other persons. You agree that you may bring claims against us only in your individual name and not as a plaintiff or class member in any purported class or representative proceeding.

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# Defending Claims: Factual Defenses

- Wiretap/interception not possible because FB is a “party”
- Consent based on website notice banners/popups
- Pixels are not configured to collect PHI/PII or other sensitive information and/or transmit that information to any third party
- General v. Authenticated Pages Argument
  - Lack of any log-in negates ability to connect information to individual
  - No transmission of information is thus possible





# Defending Claims: Settlement Considerations

- Individual v. Class-wide – Pros & Cons
- How Do you Define Class & Claims Period
- Exemplar Settlements Discussion:
  - HealthCare Related
  - Non-healthcare Related



# Questions and Answers



# Speakers



**Rich Green**

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Partner  
Hartford, Connecticut  
rlgreen@grsm.com



**Brian Middlebrook**

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Partner  
New York, New York  
bmiddlebrook@grsm.com



**Justin Holmes**

---

Of Counsel  
Philadelphia, Pennsylvania  
jholmes@grsm.com



**Graham Reynolds**

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Senior Counsel  
New York, New York  
greynolds@grsm.com



GORDON REES SCULLY MANSUKHANI  

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YOUR **50 STATE** LAW FIRM™

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