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JULY 16, 2021

Data interception class actions – S.D. Fla. dismisses claim that use of session replay software violates Florida Security of Communications Act

by James F. Bogan III

Takeaway: As we reported in a recent article – *New Class Action Trend: Website Session Replay Tools Alleged to Violate All-Party Consent Recording Requirements* (April 5, 2021) – creative class action lawyers have filed a number of actions alleging that website "session replay" tools violate state statutes such as the Florida Security of Communications Act (FSCA). At the time of that article, there had yet to be any substantive rulings in those cases. Those rulings have started rolling in, however, and they include the Southern District of Florida's recent dismissal in *Cardoso v. Whirlpool Corp.*, No. 21-CV-60784-WPD, 2021 WL 2820822 (S.D. Fla. July 6, 2021), which itself was based on the Florida state court's dismissal ruling in *Jacome v. Spirit Airlines, Inc.*, Case No. 2021-000947-CA-01 (Fla. 11th Cir. Ct. June 17, 2021) ("*Spirit Airlines*"). These decisions show that this creative use of state statutes such as the FSCA might not last that long.

According to the operative complaint, Mariana Cardoso visited whirlpool.com a number of times. During those visits, Whirlpool allegedly utilized session replay software to intercept the "electronic computer-to-computer data communications" with whirlpool.com, "including how they interact with the website, their mouse movements and clicks, keystrokes, search terms, information inputted into the website, and pages and content viewed while visiting the website." 2021 WL 2820822, at *1. Alleging that the session replay software "is not a traditional website cookie or analytical tool," Ms. Cardoso alleged that the retention and storage of the electronic data "may cause sensitive information and other personal information to leak to third parties." *Id.* Moreover, this "interception" enabled Whirlpool "to capture, observe, and divulge Plaintiff's personal interests, browsing history, queries, and habits." *Id.* This was all done, she said, "without the knowledge or consent of the Plaintiff or Class members." *Id.* Based on these allegations, Ms. Cardoso filed a single-count complaint under the FSCA in Florida state court, seeking the certification of a class and seeking remedies such as equitable relief, damages, and attorneys' fees and expenses of litigation. *Id.* at *2

Whirlpool removed the action to federal court under the Class Action Fairness Act and moved to dismiss. Relying on the recent decision of Florida state court Judge Carlos Lopez to dismiss a similar claim in *Spirit Airlines*, Judge Dimitrouleas of the Southern District of Florida granted the motion to dismiss. *Id.*

The putative class representative in *Spirit Airlines* alleged that the use of session replay software on Spirit Airlines' website violated the FSCA. Judge Lopez dismiss the case, however, ruling that "the FSCA does not apply to the plaintiff's claims regarding session replay technology software on a commercial website," and also that the plaintiff failed adequately to allege essential elements of a FSCA claim, "including that contents of her electronic communications were intercepted, that an electronic, mechanical, or other

device was used to effect interception, that electronic communications were intercepted, that interception was contemporaneous with transmission, or that the plaintiff had a reasonable expectation of privacy when visiting the website." *Id*. at *2 (citing *Spirit Airlines*, 2021-000947-CA-01, at 3-13). Finding Judge Lopez's reasoning persuasive, Judge Dimitrouleas "adopted" and "incorporated" that ruling. *Id*. Even though Judge Dimitrouleas stated that any amendment of the operative complaint would be futile – given his ruling "that the FSCA does not apply to the plaintiff's claims regarding session replay technology software on a commercial website" – he nevertheless gave Ms. Cardoso one more chance to amend, "in an abundance of caution." *Id*. at *3. In light of the multiple grounds for the *Spirit Airlines* state court ruling incorporated into the federal court's opinion, we doubt plaintiff's counsel in *Cardoso* will be able to allege an actionable claim.