

PRIVACY LAW LITIGATION TRENDS

BCLT 12TH ANNUAL

PRIVACY LAW FORUM

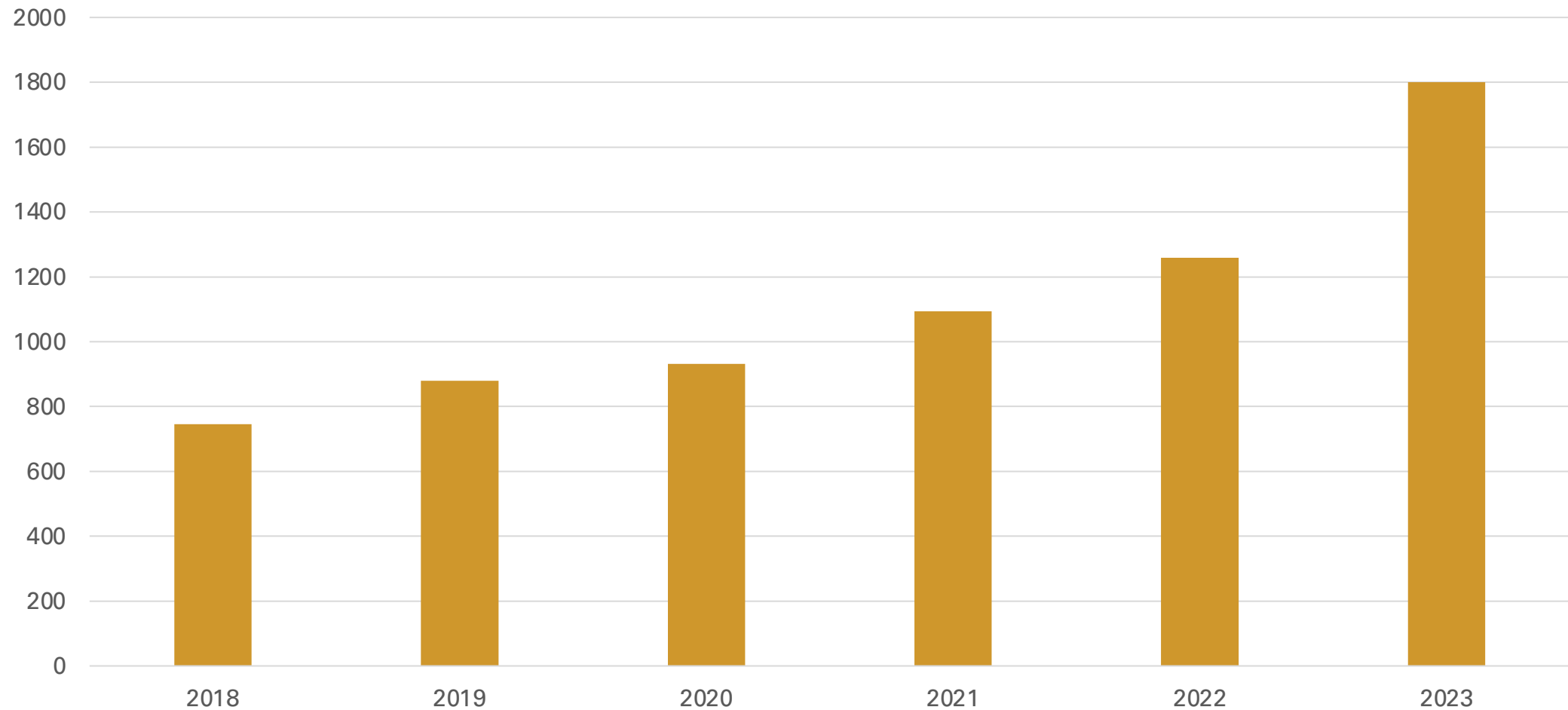
MARCH 7, 2024



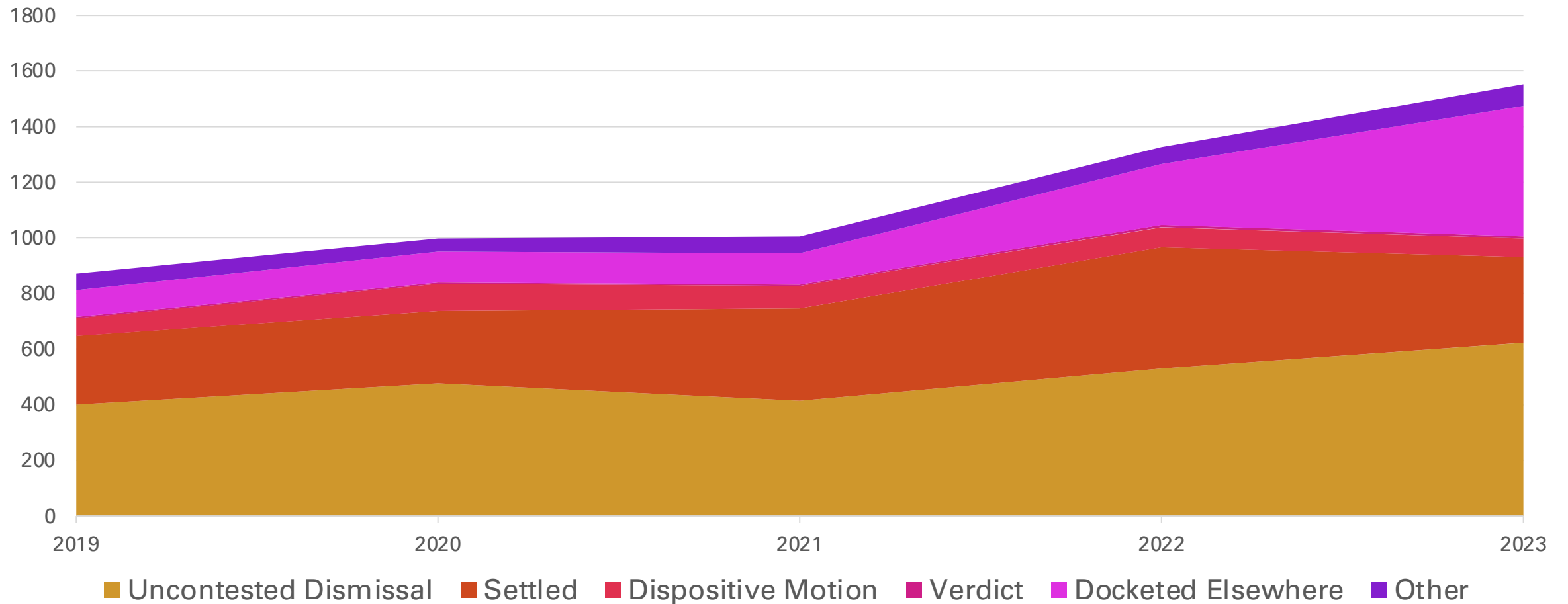
PRIVACY LITIGATION TRENDS

- I. Statistics
- II. Litigation Overview & Key Cases
 - A. BIPA
 - B. CCPA
 - C. Wiretap
- III. Other Important Developments & Trendlines

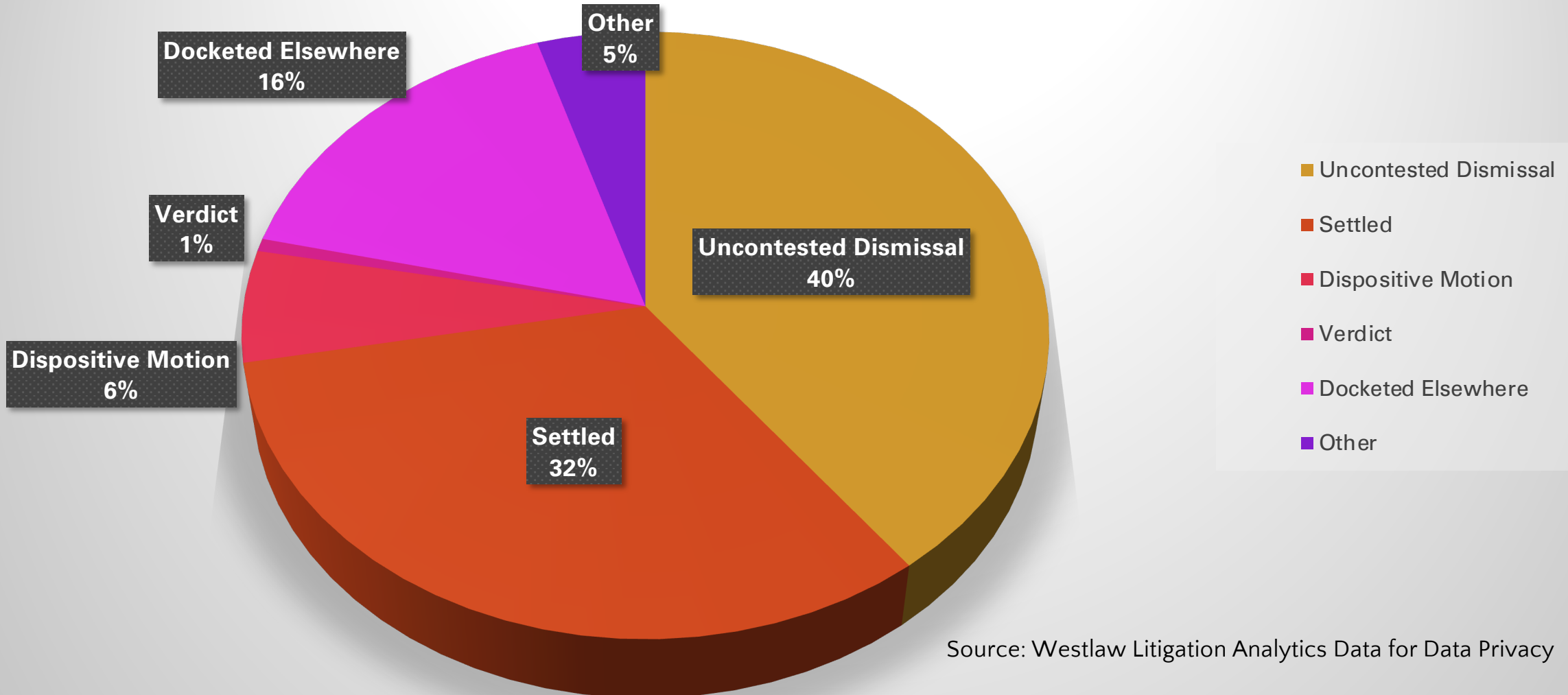
I. DATA PRIVACY FEDERAL LAWSUITS FILED



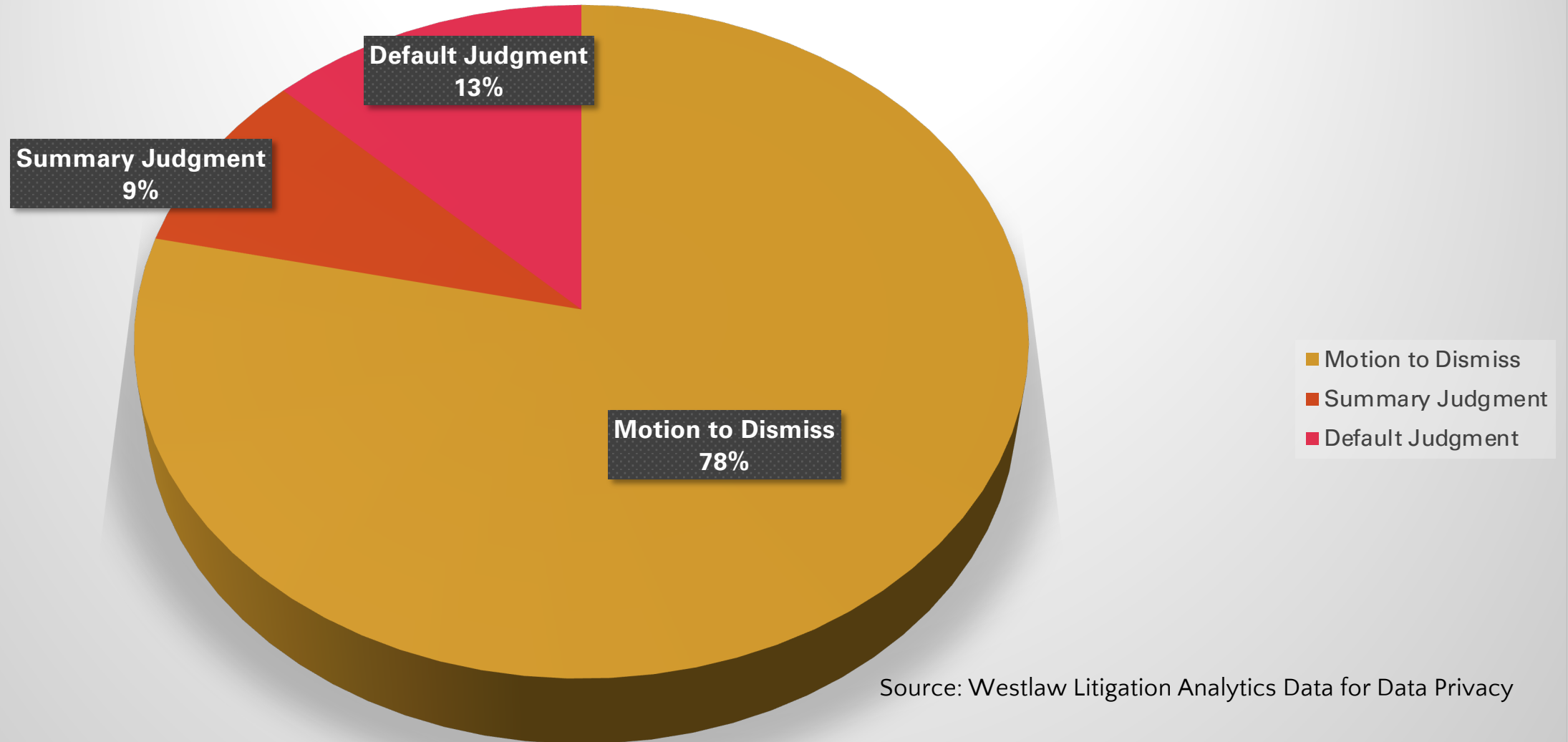
I. STATISTICS: OUTCOME ANALYTICS



I. DATA PRIVACY LITIGATION OUTCOMES



I. DATA PRIVACY DISPOSITIVE MOTIONS



Source: Westlaw Litigation Analytics Data for Data Privacy

II. BIPA LITIGATION OVERVIEW

BIPA litigation saw active participation across diverse industries

Major court rulings increased from 74 (2021) to 90 (2022)

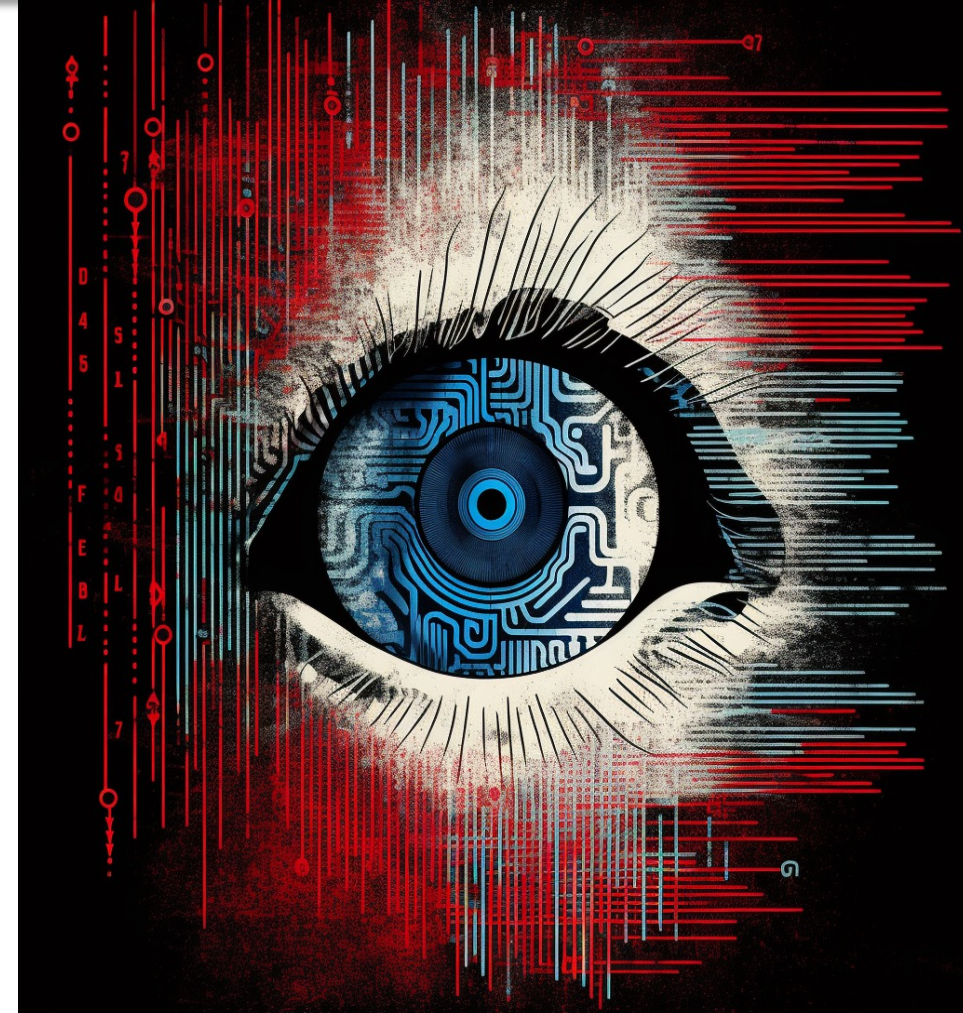
Settlement amounts varied between \$250,000 and \$100 million, exceeding 2021 range

First BIPA class-action trial resulted in a groundbreaking \$228 million verdict

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

- in favor of plaintiff(s) Richard Rogers and against defendant(s) BNSF Railway Company in the amount of \$228,000,000



II. BIPA LANDMARK DECISIONS (2022 – PRESENT)

Rogers v. BNSF Railway Co. (established vicarious liability under BIPA)

Mora v. J&M Plating, Inc. (discussed timing of implementation of data retention policies)

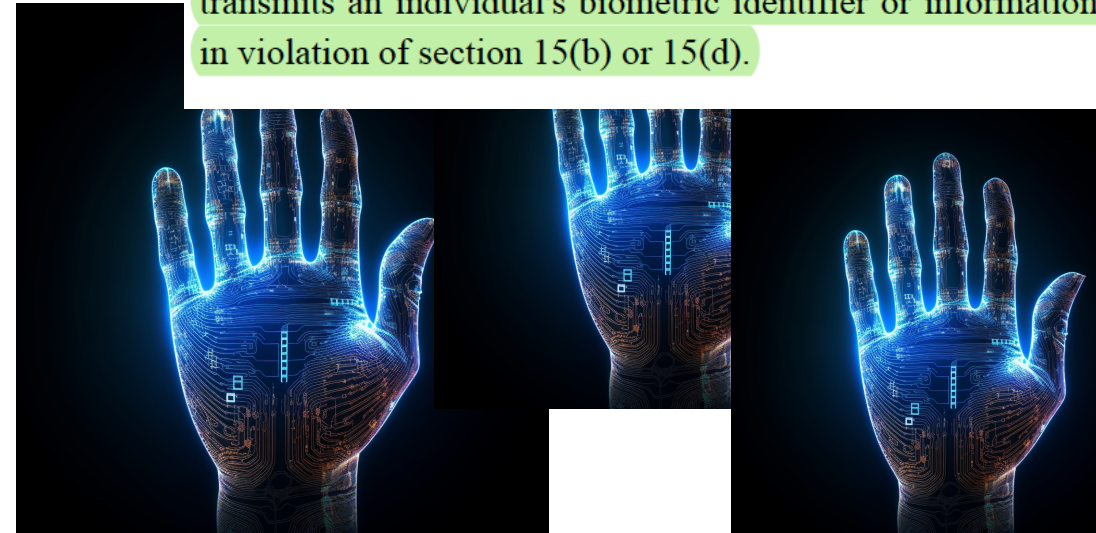
McDonald v. Symphony Bronzeville Park, LLC (rejected preemption of BIPA by Illinois Workers' Compensation Act)

Barnett v. Apple: Clarified "possession, capture, or collect" of biometric data under BIPA

Tims v. Black Horse Carriers (BIPA statute of limitations)

Cothron v. White Castle System (claim accrual and distinct violations per fingerprint scan)

Specifically, the United States Court of Appeals for the Seventh Circuit certified the following question of law to this court: "Do section 15(b) and 15(d) claims accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission?" *Cothron v. White Castle System, Inc.*, 20 F.4th 1156, 1167 (7th Cir. 2021). We hold that a separate claim accrues under the Act each time a private entity scans or transmits an individual's biometric identifier or information in violation of section 15(b) or 15(d).



II. CCPA – A FOUR-YEAR REVIEW

Decrease in new complaints in 2022, most in connection with data breaches.

Plaintiffs' claims under CCPA evolved, including attempts to apply the Act retroactively, extend its provisions to non-residents, and use the CCPA as a predicate for other claims.

In *Hayden v. Retail Equation, Inc.*, C.D. Cal. provided further clarification on these issues.

2023 introduced the California Privacy Rights Act (CPRA), enforced by the California AG and the new California Privacy Protection Agency from July 1, 2023.



II. CCPA – KEY FINDINGS

The CCPA does not shield a defendant from liability under California's Unfair Competition Law, as seen in *Kellman v. Spokeo, Inc.*

To properly articulate CCPA claims, plaintiffs must meet specific requirements, particularly concerning allegations of a lack of reasonable security.

In re Waste Mgmt. Data Breach Litigation highlighted the inadequacy of stating that the data is still "out there" as a failure to cure a breach.



II. WIRETAP

2023 saw a surge of data privacy lawsuits, imposing wiretapping liability on website operators and service providers.

Over 120 lawsuits across nine jurisdictions, with California and Pennsylvania being the focal points.

Second wave of lawsuits expanding scope beyond California and Florida.

Major focus on live chat recording in this wave.

Unique argument under California Invasion of Privacy Act (CIPA), Sections 631 and 632 being brought forward.



II. WIRETAP

California, the hub of new filings, hasn't seen significant changes in law since the first wave.

Noteworthy rulings include Ninth Circuit's ruling in *Javier v. Assurance IQ, LLC* and Judge William Alsup's decision in *Williams v. What If Holdings, LLC*.

Pennsylvania witnessing surge in activity, triggered by the Third Circuit's opinion in *Popa v. Harriet Carter Gifts, Inc.*

Key issues to watch: Role of analytics companies under CIPA (tape recorder or eavesdropper), possible defenses in Pennsylvania, and potential rulings in other jurisdictions.



IMPORTANT DEVELOPMENTS & TRENDLINES

FTC v. Kocheva (that harms are theoretically possible is insufficient; now passed the MTD)

Katz-Lacabe v Oracle America Inc.
(allegation of compiling browsing activity, online communications, and offline activity sufficient to state a claim for invasion of privacy)

