

## Washed Up: These Miami Lawyers Just Helped Whirlpool Defeat a Multimillion-Dollar Privacy Class Action

**“The decision could have a national impact as the plaintiff’s bar in other states continue to pursue a similar theory under other states’ wiretap laws,” said defense counsel.**

by Michael A. Mora

A federal district court in Fort Lauderdale dismissed a multimillion-dollar class action lawsuit brought by visitors to a website belonging to Whirlpool Corp., an American multinational manufacturer and marketer of home appliances.

Alfred Saikali and Jennifer McLoone, partners at Shook Hardy & Bacon in Miami who represented Whirlpool in the class action, said that this is the first ruling by a federal court in the Sunshine State on the latest trend in nationwide privacy litigation.

And Saikali added that the ruling could have a national



**Alfred Saikali(L) and Jennifer McLoone(R) of Shook, Hardy & Bacon in Miami. Courtesy photos**

impact as the plaintiffs’ bar in other states throughout the country continue to pursue a similar theory under their wiretap laws.

“The plaintiffs’ bar strategy to use statutory damages as a way to overcome lack of actual harm is becoming common in data privacy

litigation,” Saikali said. “But here, the court saw the strategy for what it was — an incorrect application of Florida’s wiretap law.”

This trend in privacy litigation is based on lawsuits that alleged companies violated state wiretap laws using session replay software — a

technology which companies commonly use to understand how users interact with their websites to identify and address technical problems and improve the user experience – that track visitors to their websites.

Garrett O. Berg, a partner at Shamis & Gentile in Miami, represented the class representative, Mariana Cardoso, and potentially thousands of other Floridians. They claimed Whirlpool intercepted their electronic communication without their knowledge or consent, which went beyond a traditional website cookie or analytical tool, according to court documents.

And in the order, U.S. District Judge William P. Dimitrouleas ruled that Cardoso's counsel failed to state a claim by pleading that an oral, wire or electronic communication was inten-

tionally intercepted, disclosed and used in violation of the Florida Security of Communications Act.

Now, in dismissing the class action lawsuit, Dimitrouleas, who sits in the Southern District of Florida, ruled that since the communications act did not apply to the Cardoso claim, "it appears that amendment will be futile." Still, the federal court is allowing Cardoso's counsel about 10 more days to amend the complaint.

Berg, the lead attorney, did not respond to a request seeking comment.

In reaching his decision, Dimitrouleas stated that he looked to the analysis and conclusion set forth by Miami-Dade Circuit Judge Carlos Lopez in a June 2021 order in *Jacome v. Spirit Airlines* to address the "somewhat novel, unique application of Florida law."

In that case, which relied on similar allegations, Lopez ruled the communications act did not apply to the plaintiff's claim regarding session replay technology software on a commercial website and that "holding alone" was sufficient to dismiss the amended complaint with prejudice, according to the order.

Saikali said that ruling shows how courts are becoming increasingly skeptical that a company's use of website tracking technology to track the behavior of visitors on its own website is a violation of state wiretap law.

"The decision is significant because the plaintiff's bar within the last few months has filed over 60 of these cases in various courts throughout Florida," Saikali said. "Until now, no Florida federal court had weighed in on whether these lawsuits should be dismissed."