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Chatbot Lawsuits Push Calif. Courts To Rethink Wiretap Law

By **Jason Stiehl, Jacob Canter and Kari Ferver** (September 11, 2023, 1:55 PM EDT)


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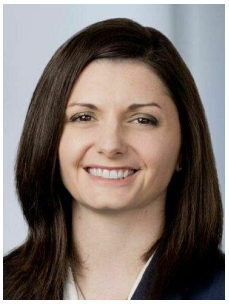
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Dozens of lawsuits have been filed in California state and federal courts seeking damages for claims under the California Invasion of Privacy Act.

These complaints all allege very similar facts: that the defendant website owner illegally eavesdrops or allows a vendor to illegally eavesdrop on website chatbot conversations.

And these complaints do not just seek substantial damages from the defendants. Rather, they seek to expand the scope of California's traditional wiretap law.

If successful, they have the potential to reshape how website operators need to balance their use of common marketing technology with adding detailed disclosures to their public-facing website interfaces.

In the last few weeks, four courts have resolved early efforts to dismiss these complaints. Two were granted and two denied.

CIPA Background

CIPA was enacted in 1967 as part of the penal code to protect the rights of Californians to have private conversations free from eavesdropping devices.

The CIPA penal code chapter allows any person to bring a private right of action for an injunction, as well as the greater of $5,000 per violation or treble damages. Recent cases have brought claims under two specific CIPA provisions: Sections 631(a) and 632.7.

Section 631(a)

Section 631(a) proscribes three independent patterns of conduct, according to Tavernetti v. Superior Court in the California Supreme Court in 1978: intentional wiretapping, "attempting to learn the contents or meaning of a communication in transit over a wire," and "attempting to use or communicate information obtained as a result of engaging in either of the previous two activities."

The final clause of Section 631(a) makes liable any person who aids another in carrying out conduct prohibited by the other three clauses.

Courts have read a party exception into Section 631(a), explaining that a party to a conversation cannot be liable for eavesdropping on that conversation, according to In re: Facebook Inc. Internet Tracking Litigation in the U.S. Court of Appeals for the Ninth Circuit in 2020.

Section 632.7

Section 632.7 prohibits the "intentional interception or recording of a communication involving a cellular phone or a cordless phone," according to Flanagan v. Flanagan in the California Supreme Court in 2002.

CIPA Analyses in Recent California Federal and State Court Orders

Garcia v. Build.com — Nothing Survives

In Garcia v. Build.com Inc. in the U.S. District Court for the Southern District of California on July 13, U.S. District Judge Dana M. Sabraw granted Build.com's motion to dismiss.

The court determined that the Section 631 claim failed under the party exception because Build.com could not eavesdrop on its own conversations.

The court also rejected the plaintiff's theory under Section 631's aiding and abetting clause, because while the complaint speculates on the identity of the third-party vendor supplying the chatbot, this speculation is insufficient to allege the existence of a third-party eavesdropper.

On the Section 632.7 claim, the court held that the statute only applied to communications transmitted by telephone, and that engaging a website chat function using a smartphone stretches the statutory language too far.

In an attempt to survive dismissal, the plaintiff has since filed an amended complaint with more fulsome allegations about the third-party eavesdropper and how the defendant allegedly aided and abetted this third party's CIPA violations.

Thomas v. Papa Johns — Nothing Survives

In Thomas v. Papa Johns International in the Southern District of California on Aug. 14, Judge Sabraw determined that, while she had specific jurisdiction over the case, the plaintiff failed to state a claim.

Sabraw incorporated her Section 631 analysis from Build.com and dismissed the CIPA claim without any further discussion. Like in Build.com, the plaintiff's theory alleged the existence of a third-party eavesdropper, but the bulk of the allegations focus on the defendant's conduct.

A case with similar allegations against the pizza chain, brought under Pennsylvania's Wiretap Act, was dismissed on Aug. 29 for lack of either general or specific jurisdiction.

In Schnur v. Papa John's International Inc., the U.S. District Court for the Western District of Pennsylvania found that the plaintiff did not adequately plead that the alleged tortious conduct was expressly aimed at Pennsylvania.

Valenzuela v. Nationwide Mutual Insurance — Some Survives

In Valenzuela v. Nationwide Mutual Insurance Co. in the U.S. District Court for the Central District of California on Aug. 14, U.S. District Judge Maame Ewusi-Mensah Frimpong reached a different conclusion, finding that the Section 631(a) theory survived dismissal.

She reached this conclusion because, in her view, the complaint alleged sufficient facts to make out claims that Nationwide aided a vendor which attempted to learn the contents of chatbot communications and used those contents for commercial benefit.

In particular, it was enough to survive dismissal that the complaint alleged that the third-party vendor had the capability to intercept messages in real time and a business objective to harvest and analyze data.

Nationwide argued that the complaint should still fail because the vendor was acting on its own behalf, and thus the party exception should apply. But the court rejected this argument, saying that a business arrangement did not transform the third-party vendor into a party to the communication.

Unlike the complaints at issue in Build.com and Papa Johns, the complaint in Nationwide effectively alleges facts to establish that the defendant has aided and abetted in eavesdropping.

The court however rejected the plaintiff's other claims, including the plaintiff's Section 632.7 claim because, she said, the statute only prohibits intrusion on a communication between two phones, not between a smartphone and a website chat feature.

Licea v. Jockey International — Everything Survives

In Licea v. Jockey International Inc. in the California Superior Court, County of Los Angeles, on Aug. 11, Judge Anne Richardson overruled a demurrer on both the complaint's Section 631 and Section 632.7 claims.

The complaint alleged that a vendor was collecting California data on behalf of Jockey and never obtained consent from website users.

Unlike in Build.com, the court said that no specific details about the vendor were needed and that the facts alleged were sufficient to overcome the party exception and for the complaint to survive dismissal.

The Jockey court said the Section 632.7 claim survived as well, citing a case where a genuine issue existed as to whether Section 632.7 covered Voice over Internet Protocol, or VoIP, technology.

On this basis, she opined that she "cannot say as a matter of law, that the use of a smartphone for the purpose of transmitting a communication in the form of data on a defendant's website, is not a communication for the purposes of Section 632.7."

Conclusion

Plaintiffs are pushing the boundaries of the technology that a CIPA claim can encompass.

These recent orders show that plaintiffs are learning about the level of detail needed to plead that a

chatbot is a third-party eavesdropper.

Courts still resist efforts to treat all communications and activities involving a smartphone as fitting within the confines of this chapter, though that may be subject to change.

The Legislature has already amended CIPA to acknowledge the growing use of cellphones. It could be the case that further amendments to address eavesdropping capabilities of VoIP, chatbots, artificial intelligence or other new technologies are not far behind.

Practitioners, even those whose clients are based outside of California, should be mindful of these developments and consider informing clients who use chatbots and similar services.

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