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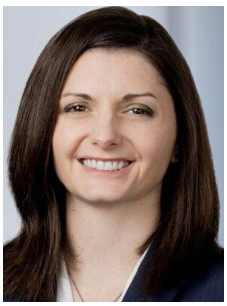
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Appellate Guidance Needed On California Chatbot Litigation

By **Jason Stiehl, Jacob Canter and Kari Ferver** (June 10, 2025, 4:53 PM EDT)


Jason Stiehl


Jacob Canter


Kari Ferver

Waves of plaintiffs have entered California state and federal courts to invoke the California Invasion of Privacy Act, or CIPA. This state privacy law, enacted in 1967 as a traditional telephone wiretapping law, is being levied in many cases against website owners that allegedly help third parties spy on visitors via chatbots.

In a September 2023 Law360 guest article, we wrote that the lack of appellate guidance on how to assess these allegations has led to mixed results at the motion to dismiss stage. Since then, the litigation landscape has continued to show variation in CIPA chatbot motion to dismiss orders.

In April, the U.S. Court of Appeals for the Ninth Circuit clarified one key CIPA question regarding personal jurisdiction, in an en banc order in Briskin v. Shopify Inc. that has sweeping implications for any action involving internet-based allegations, and is poised to resolve another shortly.

But even more guidance needs to come, especially as CIPA cases are beginning to make it to the summary judgment stage of litigation. Such guidance would also provide insight into the Ninth Circuit's willingness to stretch the language of pre-internet statutes to encompass activity unique to newer technologies, such as generative artificial intelligence.

As background, CIPA Section 631(a) prohibits intentional wiretapping, attempting to read or learn the contents or meaning of a communication in transit over a wire, attempting to use or communicate information obtained as a result of engaging in either of the previous two activities, or aiding and abetting any of these violations. Section 631 also has a "party" exemption that immunizes a party to the communication from liability.

Section 632.7, meanwhile, prohibits the intentional interception or recording of a communication involving a cellular phone or a cordless phone. Plaintiffs often, though not always, bring claims under both Section 631 and Section 632.7 in their complaints.

Recent CIPA Litigation

Valenzuela v. Kroger — Dismissed With Prejudice

On March 13, U.S. District Judge Dolly Gee dismissed an Section 631(a) aiding and abetting claim with prejudice, in Valenzuela v. The Kroger Co. in the U.S. District Court for the Central District of California. In 2023, this court had dismissed most of the same plaintiff's case, but allowed the plaintiff to amend her aiding and abetting claim.

In her pleading, the plaintiff claimed that Kroger aided and abetted its chatbot software provider Emplifi in eavesdropping on website visitors. The court ruled that such a claim, to survive, needed to plausibly explain how Kroger either engaged in conduct that breached a duty to website visitors or knew that Emplifi's conduct constituted a breach of a duty to website visitors.

To attempt to meet this knowledge requirement, the plaintiff alleged that Kroger knew that Emplifi, instead of simply using its software "like a tape recorder to archive conversations," was breaching a duty to website visitors, by profiting off of the intercepted conversations through allowing Meta to mine chat data for information about user interests.

The plaintiff alleged that Kroger was aware of this data harvesting practice because (1) the practice enabled the software to be quickly and cheaply deployed; (2) the chatbot mimicked Kroger's appearance, so that users believed they were interacting with Kroger as opposed to a third-party chatbot; and (3) Emplifi advertised that it shared data with Facebook Messenger, and that it used information from the chatbot to train new chatbots.

The court held that these allegations did not give rise to a plausible inference that Kroger had knowledge that Emplifi had breached a duty to its website visitors. First, the court held that the quick-and-cheap-deployment theory of knowledge failed because the mere fact that the chatbot was quick and cheap did not establish that "Kroger should have known [that] Emplifi harvested user data."

The brand-mimicking theory of knowledge failed for the same reason. And the advertising theory of knowledge failed because these allegations contradicted other information about Facebook and Emplifi contained in links and screenshots within the pleadings — namely, that Facebook only shared data when users opted into such sharing, and that Emplifi stated on its website that it did not harvest data to train new chatbots.

Helpfully, the court's opinion also analyzed other decisions that address CIPA aiding and abetting claims. For example, Judge Gee cited Rodriguez v. Ford Motor Co., decided by the U.S. District Court for the Southern District of California in December 2024, which held that a plaintiff sufficiently alleged that a website owner knew that a software provider's activity equated to a breach of duty.

The allegations supporting this holding included that publicly available information on the chatbot provider's website advertised that the provider "monitored billions of visitor sessions per month" and combined this monitored data to "develop insights" to "optimize campaign outcomes for sales and service transactions."

The chatbot provider's website also advertised to clients that the provider's software was built on "one of the world's most extensive customer datasets," indicating that the provider was profiting off of and harvesting the gathered website visitor data.

Torres v. Prudential — Summary Judgment Granted

On April 17, U.S. District Judge Charles Breyer in the U.S. District Court for the Northern District of

California granted the defendant's motion for summary judgment in Hazel v. Prudential Financial Inc., a CIPA matter.

Judge Breyer found no genuine dispute of material fact as to whether the chatbot on Prudential's website "reads or attempts to read" the plaintiff's communications while they were "in transit," per the plain language of Section 631. The court interpreted this sentence to mean that a plaintiff must show that the chatbot reads or attempts to read a communication literally while the communication is in transit.

The plaintiff only alleged that the chatbot's employees could access the communications at a later time. The court rejected the plaintiff's argument that this would spell doom for any CIPA claim concerning the internet, where communications are nearly instantaneous.

The court acknowledged the California Legislature's intent to interpret CIPA broadly to account for new technologies, but held that nonetheless, such a position did not reconcile the Legislature's intent with a narrow reading of the "in transit" language.

Per Judge Breyer, whether or not his holding meant that "CIPA would never apply in the context of the internet," it "would stretch CIPA's statutory language too far to interpret 'while ... in transit' to encompass any hypothetical future attempt to read or understand the meaning of a communication."

Thomas v. Papa John's — Appellate Oral Argument Imminent

On both Aug. 14, 2023, and May 8, 2024, U.S. District Judge Dana Sabraw of the Southern District of California dismissed CIPA claims related to alleged eavesdropping code deployed on Papa John's website. Following these decisions in Thomas v. Papa John's International Inc., the parties cross-appealed to the Ninth Circuit in June 2024.

In its appellate briefing, the plaintiff argued that, in dismissing her Section 631(a) claim, the district court improperly applied the party exemption, finding that Papa John's could not eavesdrop on itself. The court had dismissed the complaint because it held that Papa John's only used a third-party tool to participate in the conversation, and using a tool like a tape recorder to participate in a conversation does not constitute eavesdropping.

The plaintiff argued that courts have improperly expanded this party exception, which, under California law, only applies to the recording of a phone conversation by a participant to that conversation. California law provides no such exception for cases involving third-party eavesdroppers — and finding otherwise, the plaintiff asserted, would convert CIPA's all-party consent requirement into a one-party consent rule.

In her complaint, the plaintiff identified the existence of a specific third-party eavesdropper, the software company FullStory Inc., and further alleged that this third party intercepted users' communications in real time and stored copies on its servers.

FullStory allegedly created a reenactment of the user's visit to the Papa John's website using the intercepted data. FullStory then allegedly used these captured reenactments to "fingerprint" each website user, and associate that user with visits to other websites that also used FullStory's code.

These allegations, per the plaintiff, showed that a third-party eavesdropper was present in

communications between the plaintiff and Papa John's, and was acting as much more than a tape recorder.

The Papa John's cross-appeal contested the district court's finding that it had specific personal jurisdiction over Papa John's. In light of the Shopify en banc decision, issued after the Papa John's cross-appeal, Papa John's is unlikely to succeed with this argument. The Ninth Circuit is currently considering the case for oral argument.

Conclusion

Judge Sabraw, in her second Papa John's decision, noted that CIPA and other chatbot claims represent "numerous cases filed in federal courts around the country."

The potential for these claims is only likely to increase with new technologies such as artificial intelligence that make it easier to deploy chatbots in various useful commercial contexts. For example, could a court find that a generative AI-based chatbot can read and understand the meaning of a communication in transit, even if it is instantaneous?

These cases are important to consider well beyond the privacy and cybersecurity context. The Ninth Circuit's Shopify ruling clarifies a key threshold issue — jurisdiction over online conduct — for not only CIPA cases, but numerous other types of actions implicating online conduct.

Moreover, the risk of liability arising from these cases is significant. Each CIPA violation risks a statutory damage claim worth $5,000. And every modern website is using tools that may create risks of violating this 1960s-era California statute.

That this statute was created before the existence of the internet is not stopping plaintiffs from invoking it, and courts appear to have mixed views about allowing those claims to proceed. This is an area of law where appellate guidance will continue to be hugely beneficial.

It would help plaintiffs to know when viable claims can be made. It would help defendants to know when it makes sense to litigate, and when it makes sense to settle. It would help website owners know what steps to take to mitigate risk of litigation, including adoption of opt-in privacy and cookie policies.

The Papa John's Ninth Circuit decision will be informative. But answers to other questions are needed as well. For example, under CIPA, what is a communication? And, assuming the Torres summary judgment order is appealed, the Ninth Circuit may soon weigh in on the meaning of "in transit."

The Shopify en banc decision indicates that the Ninth Circuit defers to the California Legislature's plaintiff-friendly mandate to interpret CIPA broadly in consideration of new technologies. Future appeals will reveal whether this deference is limited to the context of personal jurisdiction. And there is always a possibility that the U.S. Supreme Court could weigh in on these issues.

Jason Stiehl is a partner, Jacob Canter is counsel and Kari Ferver is an associate at Crowell & Moring LLP.