

Digital Defense: Safeguarding Your Business and Website From Privacy Act Risks

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December 18, 2024



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Background on Privacy Violation Claims

- » Most claims are being filed under the California Invasion of Privacy Act (CIPA), but businesses all over the country are being targeted
- » The primary basis for bringing claims under CIPA is its statutory penalty of \$5,000 per violation
- » In bringing claims for violations of CIPA, claimants usually also allege violations of the Federal Wiretap Act and common law invasion of privacy claims



Background on Privacy Violation Claims

- » The Massachusetts Supreme Judicial Court recently held that simple web browsing does not violate the Massachusetts Wiretap Act - *Kathleen Vita v. New England Baptist Hospital, et al*, Massachusetts Supreme Judicial Court, No. SJC-13542.



Background on Privacy Violation Claims

» What Does CIPA Prohibit?

» California Code, Penal Code - PEN § 631

(a) Any person who, by means of any machine, instrument or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place

» 637.2 (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

» (1) Five thousand dollars (\$5,000) per violation

» (2) Three times the amount of actual damages, if any, sustained by the plaintiff



Background on Privacy Violation Claims

- » Case Law Developments
 - » California courts have recently held that simply browsing or perusing a website is not sufficient to allege that the contents of a “communication” were intercepted and form the basis of a CIPA claim. *St. Augustine v. Great Wolf Resorts, Inc.* 2024 WL 3450967 (S.D. Cal. July 18, 2024)
 - » California courts have also recently held that a violation of CIPA requires a concrete injury-in-fact, not just statutory penalties. *Rodriguez v. Fountain9, Inc.* 2024 WL 3886811 (Cal. Super. July 9, 2024)



Background on Privacy Violation Claims

- » Future Forecast
 - » What types of businesses are plaintiffs targeting?
 - » Will claims change or continue over time?



Strategies for Defending CIPA or Other Privacy Claims

- » Claimants' firms prefer to be in arbitration (generally with JAMS or AAA) for several reasons:
 - » It keeps the volume of claims they are filing private
 - » It requires businesses to pay arbitration fees, adding to settlement leverage
 - » It avoids potential harmful decisions interpreting CIPA and other privacy statutes



Strategies for Defending CIPA or Other Privacy Claims

- » Response to Initial Demand Letter
 - » Raise your strongest defenses at the outset and before Claimant and its lawyers invest the initial arbitration filing fee
 - » Generally, the chances of a Claimant abandoning a claim in the face of strong defenses is higher where they are raised in response to the initial demand letter and prior to the filing of an arbitration claim
 - » Do not ignore a demand letter thinking it will just go away



Strategies for Defending CIPA or Other Privacy Claims

- » Initial Response to AAA or JAMS
 - » Raise any issue with choice of law or choice of venue. Note that California case law shows that just browsing is not sufficient. If so, file dispositive motion for failure to state a claim.



Strategies for Defending CIPA or Other Privacy Claims

» Plaintiffs' Firms Strategies

- » They are looking for quick settlements, and they use the threat of arbitration fees as leverage to force companies to pay
- » Making assumption that defendants will not hire a lawyer because of the cost and will pay a quick settlement
- » File multiple arbitration claims against a single company at once to gain settlement leverage
- » Target small businesses and startups that may not have significant resources to defend these claims



What You Can Do to Mitigate Risk

- » If your business is not based in California, you should have a more favorable state's law in the Choice of Law provision of your website's Terms of Use, and include a pre-arbitration notice provision
- » Generally, any state other than California is preferred



What You Can Do to Mitigate Risk

- » Incorporate AAA and JAMS mass arbitration terms in your website's Terms of Use to mitigate costs and exposure in the event your business faces a large number of individual claims. The mass arbitration rules will provide for a streamlined resolution and reduce arbitration fees.



What You Can Do to Mitigate Risk

- » Cookie Consent Tool: Software or widget used to inform users about the use of cookies, gather their consent for specific cookie categories, and manage those preferences in compliance with data privacy regulations.
- » Click Wrap Banner: User agreement interface that obtains a website user's consent or agreement to terms, policies, or actions. Users are typically required to explicitly interact with the banner (e.g., by clicking an "Accept" or "Agree" button) to indicate their consent before proceeding.
- » Have a Class Action Waiver



Questions?

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