Strike Three – Lack of Scienter Dooms CIPA Class Action Claiming Website Owner Aided and Abetted Chat Bot Software Provider's Alleged Eavesdropping

BY MICHAEL R. MCDONALD · MARCH 28, 2025

In *Valenzuela v. The Kroger Co.*, the District Court for the Central District of California granted, for the third and last time, defendant's motion to dismiss a class action lawsuit claiming that The Kroger Co. violated section 631(a) of the California Invasion of Privacy Act (CIPA) by allowing third-party software (provided by Emplifi) to be embedded on its website to record consumers' communications with the website's chat function. The only issue before the court was whether the amended complaint plausibly alleged liability under prong four of CIPA 631(a)—"that Kroger aided and abetted Emplifi's eavesdropping on Kroger's website users' chats."

In its previous ruling, the court held that merely using embedded software to archive communications, like with a tape recorder, would not give rise to a statutory violation. Instead, to state a claim under prong four of CIPA 631(a) there must be plausible allegations explaining how Kroger knew that Emplifi engaged in conduct constituting a breach of duty, *e.g.* by sharing users' data with third parties, or how Kroger itself engaged in conduct that constituted a breach of duty. Because prong four of CIPA 631(a) does not contain an explicit scienter requirement, the court applied California common law of aiding and abetting, under which aiding and abetting liability for an intentional tort can be imposed only if the person "(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person."

Plaintiff's third attempt to plead scienter failed. *First*, the court explained that it could not plausibly infer "that because Emplifi could 'quickly and cheaply' deploy the bot, Kroger should have known Emplifi harvested user data." *Second*, that Emplifi

advertised to customers such as Kroger that the bot "mimics the look and feel of the customer's own brand" so that users believe they are interacting with the customer did not equate to knowledge on the part of Kroger that Emplifi breached a duty toward users. *Third*, though the complaint alleged that Emplifi advertised that its chat bot services shared data from chat conversations with Facebook Messenger, the documents relied upon for this assertion "flatly controvert[ed] such a characterization."

Finally, the district court rejected plaintiff's argument that there is no scienter requirement at all under the fourth prong of section 631(a), finding "more persuasive [various] rulings that impose a scienter requirement on the statute, consistent with California law when a statute lacks an explicit scienter requirement."
State and federal courts continue to be flooded with website-related claims for violations of CIPA 631(a). Though there is generally a presumption against extraterritorial application of state law, determining the "place of the wrong" will often depend on the complaint's allegations and the technologies employed. As these and other CIPA-related issues remain unsettled, even companies with little-to-no California presence will continue to be hauled into California courts to defend no-injury CIPA website class actions, at least until appellate courts provide much needed guidance.

Tags: Class Actions Motions to Dismiss

CIPA Litigation and the "Technological Capability" to Violate California's Privacy Laws

BY MICHAEL R. MCDONALD AND CAROLINE E. OKS · MARCH 7, 2025

In *Ambriz v. Google, LLC*, a court in the Northern District of California refused to grant Google's motion to dismiss the plaintiffs' claims under Section 631(a) of the California Invasion of Privacy Act (CIPA) for (i) "intentional wiretapping," and (ii) "willfully attempting to learn the contents or meaning of a communication in transit." The lawsuit challenges Google's AI-powered product, Google Cloud Contact Center AI ("GCCCAI"), which is used to support the customer service centers of other businesses by providing a virtual agent with whom callers can interact.

The plaintiffs alleged that they placed customer service calls to businesses that use the GCCCAI service – specifically, Verizon, Hulu, GoDaddy, and Home Depot – and spoke with a "virtual agent" and human representative but did not know that Google would be listening in on and transcribing the call. Nor did the plaintiffs consent to Google's alleged eavesdropping. Google moved to dismiss the CIPA claims on the ground, among others, that it simply provides a software tool to its business clients and was not "an unauthorized third-party listener to the communications between the named Plaintiffs and the customer service centers they called."

In denying Google's motion to dismiss, the court began its analysis by explaining the split that has emerged in cases interpreting CIPA 631(a): Some courts require a plaintiff to allege that the software vendor actually used the data it obtained for its own, independent purposes (the so-called "extension test"), while other courts only require a plaintiff to allege that the software vendor has the capability to use the data for its own purposes, as set forth in *Javier v. Assurance IQ, LLC* (the so-called "capability test"). The court then applied the "capability test," reasoning that (i) it would be improper to impute a use requirement to all of section 631(a) given that, as the *Javier* court noted, "there is already a use requirement in one of section 631(a)'s discrete clauses ('us[ing], or attempt[ing] to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained')," and (ii) the California Supreme Court had never before considered the third-party listener's intentions or

their use for the information obtained. Based on Google's terms of service, which allow Google to "use data collected on customer service calls for its own purposes if its business clients grant it permission to do so," the court found "a plausible inference that Google has the ***technological capability*** to use the data it collects and analyzes, regardless of whether it actually makes use of that data." The mere fact, therefore, that Google had the technological capability to use such data was the determining factor. Because Ambriz alleged that he called Verizon customer service several times and spoke with both a GCCCAI virtual agent and human agent, his case could proceed to discovery.

Ambriz adds to the growing list of California courts' decisions that have continued to allow CIPA litigation where there is seemingly "no injury."

Tags: AI Artificial Intelligence CIPA Class Action

ChatBot or Not: California Federal Courts Limit CIPA Applicability

BY CAROLINE E. OKS · SEPTEMBER 3, 2024

The Northern District of California recently issued a decision further constraining plaintiffs' ability to assert claims under the California Invasion of Privacy Act (CIPA). In *Ambriz v. Google, LLC*, the plaintiff filed a putative class action alleging that Google violated CIPA § 631(a) because its Cloud Contact Center AI software-as-a-service, a virtual customer service tool, wiretapped, eavesdropped on, and recorded his call to Verizon's customer service center.

The court dismissed the plaintiff's CIPA claim, holding that it was barred by Section 631(b), which exempts telephone companies and their agents from liability "where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility or telephone company." *First*, the court reasoned, Verizon is a telephone company within the meaning of § 631(b). *Second*, the complaint alleged that Google acted as Verizon's agent under § 631(b)(1) insofar as its Cloud Contact Center AI provides a "virtual agent" to interact with Verizon customers who thus "reasonably believe the virtual agent is provided by the company they are calling (*e.g.*, Verizon)." *Third*, Google's alleged wiretapping conduct was "for the purpose of . . . operation of the services and facilities of" Verizon. On this last point, the court rejected the plaintiff's argument that only wiretapping "necessary" to a telephone company's services is exempted under § 631(b)(1), given that the plain language of the statute does not contain such a necessity requirement.

This decision reflects a recent trend by federal courts in California scrutinizing the abundance of putative class action claims asserting violations of CIPA. For example, in *Garcia v. Build.com*, the Southern District of California dismissed claims under CIPA § 631(a), which prohibits intentional wiretapping and imposes liability on any person who aids another in carrying out conduct prohibited in the section. This was the second time the court dismissed the plaintiff's claims on the ground that the

plaintiff failed to adequately plead the existence of a third-party eavesdropper (noting that a defendant cannot eavesdrop on its own conversations) separate from Build.com, or that any third party committed a predicate violation that the defendant aided and abetted. The court held that the plaintiff's allegations about the defendant's chat functions were "conclusory, unsupported, and insufficient."

Dozens of lawsuits have been filed in California state and federal courts seeking damages for claims under CIPA, but whether these claims can survive motions to dismiss remains difficult to predict. Plaintiffs have attempted to push the boundaries of CIPA to adapt to ever-changing technology, but courts are starting to require more detail to meet pleading standards. The viability of many such claims appears to depend on the strength of specific factual allegations that suggest a third party is benefitting from use of the data, and not simply acting as a recorder. For example, in *Jones v. Peloton Interactive Inc.*, the Southern District of California held that the plaintiff stated a claim by alleging that Peloton's third-party software, "Drift[,] functions as a third-party eavesdropper because it uses the intercepted data for its own purposes including to improve the technological function and capabilities of its patented AI software assets for the exclusive purpose of increasing the value of Drift's shareholders equity in the company." The court allowed this case to proceed to discovery upon finding that the complaint adequately alleged that Drift used the intercepted data for its own benefit, and not solely for the use of the party to the communication, *i.e.*, Peloton.

This area of the law is constantly evolving, and companies who use website chat features and chatbots should be mindful of these developments.

Build.com is a client of Gibbons P.C. the firm and, specifically, the author of this blog post was actively involved in the litigation.

Tags: Class Action Consumer Class Action Defense Motion to Dismiss Granted