Bloomberg Law

Privacy and Security Law Report®

Litigation

Call Recording Class Actions: Why Your Business Should Care

Recording Calls

There has been a recent upswing in telephone call recording actions across the U.S., so businesses should be mindful of their call-recording practices, be on the alert for future litigation, be proactive in training employees and providing them manuals that address proper call-recording protocols and practices, the author writes.

BY NATALIE PRESCOTT

Imagine being served with a putative class action complaint that seeks millions in damages against your company for ''illegal recordings.'' Whether you are a sophisticated general counsel of a large corporation or an in-house lawyer at a small mom-and-pop shop, this is unwelcome news. Class actions inevitably disrupt business operations, and they are very expensive to litigate and often are even more expensive to settle. You skim the complaint and discern quickly that this is a call-recording class action, based on another state's law, such as, for example, California Invasion of Privacy Act (CIPA), Penal Code sections 631 *et seq*. And at first, you are not in the least concerned because you do not actually do business in that other state.

''My company is incorporated in Delaware and based in Texas,'' you may say. ''We have a small base of California customers and no offices in California.'' ''Our calls are recorded in a small town in Texas, and our employment agreements authorize all such recordings.'' Be it as it may, CIPA does not excuse out-of-state businesses from compliance even in these circumstances. Instead, the law broadly prohibits unconsented recordings of any calls to or from unsuspecting California residents—regardless of where the recordings actually occur, or where your business operations are, or if those who push the record button have themselves consented. What's more, you may be completely unaware that the customer you are recording has the protection of CIPA. Suffice it to say, CIPA is as unique as it is far-reaching, similarly to a handful of similar laws in other states.

Natalie Prescott is an associate with Mintz Levin PC in San Diego. She is a certified privacy professional (CIPP/US) and a member of the firm's privacy and security group.

Enacted in the 1960's, CIPA is a somewhat unusual law, which prohibits unconsented recordings, unless all the parties to the conversation are informed and agree to be recorded. These types of statutes are known as a ''two-party-consent'' law. Although most states are ''one-party-consent states''—which broadly authorize secret recordings, as long as at least one party to the conversation agrees to being recorded—the regulations of recorded conversations in a handful of ''two-party'' consent states are much stricter. These states, which appear to include California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania, and Washington, require that all parties understand and agree to be recorded at the outset of the recording.

Recently, there has been an upswing of call recording actions brought by residents of these states. While the exact reason for this increase of call-recording cases in states like California is difficult to pinpoint, several factors may be to blame.

First, unlike other privacy class actions, CIPA plaintiffs do not need to show an actual injury or concrete harm to prevail. Rather, statutory damages are available to plaintiffs on an almost ''automatic'' basis, without proof of actual harm. This allows plaintiffs to navigate around the ''particularized harm'' bar that often has been successfully utilized by defense lawyers in

other types of privacy cases (at least until the most recent Ninth Circuit's 2017 ruling in *Spokeo*, which has somewhat relaxed this standard).

Second, CIPA is a very plaintiff-friendly law. As such, its statutory requirements, high damages per each recorded call, and the fact that it is more difficult to defeat certification in these cases on commonality and typicality grounds all make this an attractive case for plaintiffs' law firms.

Third, a wave of recent state and federal court decisions produced some inconsistencies in how CIPA laws are interpreted. Many such cases culminated in plaintiff-friendly ruling. Inevitably, this emboldened the plaintiffs' class action bar and helped revive this wave of cases.

Lastly, CIPA class actions are expensive for companies to litigate, and class damages can be significant. This again means that any businesses that secretly or even unwittingly record calls in two-consent states are a very easy target for the plaintiffs' bar.

Of particular interest to these plaintiffs' lawyers and to businesses defending call-recording cases are two statutes: California Penal Code section 632, which prohibits recordings of confidential communications and section 632.7, which prohibits recordings of calls on cellphones and wireless phones.

Section 632(a) provides that a ''person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.''

Section 632.7(a) states that any ''person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) . . . .''

Although there has been a great deal of disagreement over how these statutes should be interpreted, the general—albeit oversimplified—consensus is that section 632 applies to landline calls that are confidential in nature; while section 632.7 bars recordings of any calls (confidential or not) that take place over a wireless phone. Interestingly, courts have not yet expressly ruled on whether VOIP calls, which are neither landline, nor cellular phones but are an internet-based application, are prohibited by CIPA.

Lack of landline phones or utilization of VOIP services for call recording are not the only potential defenses, however. Businesses often record calls for quality assurance and service-monitoring purposes. Arguably, these legitimate reasons for recording customer calls should fall outside of the scope of statutes like CIPA. Responding to this concern, at least some courts have found this to be a viable defense in CIPA cases.

All valid defenses must come into play in call-recording class actions. After all, legitimate business recordings should be encouraged because they help provide better customer experience, verify disputes, and improve the quality of service. Undisputedly, the lawmakers' goal was not to prohibit such service monitoring—it was to prevent unlawful third-party interceptions of calls and eavesdropping, as the legislative history of CIPA readily demonstrates.

Unfortunately, while some courts have adopted this reasoning, many others have rejected it. The outcome of any new case will depend on the judge who ultimately decides these issues and on whether knowledgeable and skilled privacy class action lawyers represent the company's interests.

It cannot be underscored enough that relying on general litigation attorneys without CIPA experience to defend privacy class actions will not only expose the company to risks, but it will also potentially generate more unfavorable law and create plaintiff-friendly precedential rulings in California and across the nation. Inevitably, this will lead to yet another increase in the number of call-recording class actions, affecting more and more businesses down the road. So it is imperative to work with a knowledgeable legal team and to build a strong defense strategy at the outset of the case.

Looking ahead, businesses should be mindful of their call-recording practices long before the problems arise. The number of filings of call-recording class actions will likely steadily increase in the next few years. Companies facing the biggest risk of lawsuits in this area are those that conduct their business in one-party-consent state but occasionally or frequently interact with the residents of two-party-consent states such as California, Florida, or Washington, to name a few.

Inevitably, this situation will result in unconsented recordings and will potentially provide a sufficient basis for class action allegations. With a large enough customer base, the class can be deemed sufficiently numerous and may be quickly certified. To avoid litigation, companies that record calls should provide a disclaimer at the outset of the call, whether or not their home state requires such a disclaimer. Businesses should also be on alert for future litigation and be proactive in their housekeeping, including training employees and providing manuals that address proper call-recording protocols and practices. It remains to be seen if VOIP, service-monitoring, and other defenses will prove fruitful, as federal courts around the country tackle these issues. But the best way to defend against costly call-recording class actions is to avoid them in the first place—by taking the steps to train employees, write good policies, provide valid disclaimers, or cease recordings altogether.

BY NATALIE PRESCOTT

To contact the editor responsible for this story: Donald Aplin at daplin@bna.com

  PVLR ISSN 1538-3423