

Defenses Remain For Companies In Calif. Call Recording Suits

By **Joshua Briones and Crystal Lopez** (June 20, 2018, 1:10 PM EDT)

For over a decade now, the plaintiffs bar has been serially filing class actions under Sections 632 and 637.2 of the California Invasion of Privacy Act, seeking multimillion-dollar settlements based on statutory damages of \$5,000 per violation or three times the amount of actual damages, whichever is greater. Because of this availability of statutory damages, and the possibility of multiple violations, in the last two years alone, more than 65 cases have been filed, many of which have been removed to federal court, alleging violations of Sections 632 and 632.7.

Courts have said that the California Invasion of Privacy Act (Cal. Penal Code §§ 630-637.5) was enacted by the Legislature "to ensure an individual's right to control the firsthand dissemination of a confidential communication, and ... to strongly protect an individual's privacy rights in electronic communications." [1] Section 632 of CIPA requires the consent of all parties prior to recording confidential communications, while Section 632.7 of CIPA requires consent before recording certain mobile phone calls.

Historically, many defendants settle these cases out of fear that liberal California courts will find violations of CIPA even where no confidential information is recorded and where no one is harmed. Several decisions in the first half of 2018 provide defendants with additional strategies for disposing of CIPA claims on dispositive motions.

Recent Decisions

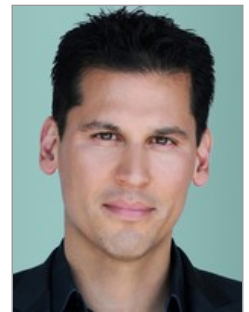
Gruber v. Yelp

In this case, [2] Eric Gruber alleged that Yelp Inc.'s one-way recording violated CIPA because the one-sided recordings effectively recorded Gruber's conversations without his knowledge or consent, and constituted unlawful wiretapping. As part of Yelp's standard procedure, Yelp's representatives had these conversations with Gruber via Voice over Internet Protocol. Gruber's voice was never recorded during his conversations with Yelp's sales representatives.

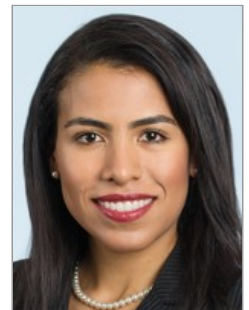
The court disposed of plaintiff's CIPA claims on a motion for summary judgment holding that (1) CIPA is inapplicable to calls made to and from VoIP, and (2) Gruber presented no evidence or authority to allow the court to find that Yelp's one-way recording of its sales representatives violates CIPA. The court also denied the plaintiff's request for leave to find a substitute representative because unlike in *Cashcall Inc. v. Superior Court*, there was no evidence that Yelp illegally monitored any phone calls.

Gonzales v. Uber

In this case, [3] plaintiff Michael Gonzales, a driver for Lyft Inc., filed a putative class action alleging that Uber Technologies Inc. violated Sections 632 and 637.7 of CIPA by intercepting, accessing, monitoring, and transmitting Lyft drivers' electronic communications and whereabouts. The plaintiff alleged that Uber secretly used a technology called "Hell Spyware" to extract information from Lyft drivers by posing as Lyft customers in search of rides. "As a result, Lyft's servers transmitted a response to Uber's fake Lyft requesters containing the IDs, on duty status, pricing, and exact locations of nearby lift drivers." [4] Uber argued that the plaintiff's CIPA claims fail because (1) the plaintiff failed to allege Uber 'eavesdropped' on any 'confidential communications' and (2) the plaintiff consented to the monitoring. [5]



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The court dismissed the plaintiff's Section 632 claim because he did not allege that Uber "eavesdropped" on communications between Lyft drivers and legitimate Lyft riders or between Lyft drivers and Lyft. The court also concluded the plaintiff's 632.7 claim failed because the plaintiff consented to the tracking of his vehicle through his cellphone when he signed up to be a Lyft driver.[6]

Ronquillo-Griffin v. TransUnion

In this case,[7] the plaintiffs filed a class action alleging that defendant TransUnion Rental Screening Solutions Inc. violated section 632.7 of CIPA by recording their cellphone conversations without consent. During discovery the plaintiff requested: (1) "all audio recordings for persons similarly situated to Plaintiff"; (2) "all audio recordings for any account associated with a California address"; (3) "all audio recordings for any account containing a California area code"; and (4) "all audio recordings of telephone conversations with consumers whose telephone numbers had a California area code." [8] The defendant objected to the requests on the basis that the recordings contain confidential and private information and the plaintiffs had not explained the relevancy of the content of the calls. The plaintiff filed a motion to compel.

The court denied the plaintiffs' motion to compel because it found the plaintiffs did not provide any evidence indicating the significance of the contents of the call, the information could be obtained via less-intrusive discovery, and the conversations contain sensitive and private information.

Takeaways

Enterprising plaintiffs counsel continue to file call-recording class actions. Businesses in the crosshairs of these types of cases are those that conduct their business in one-party-consent states but occasionally or frequently interact with the residents of two-party-consent states such as California, Florida and Washington. These companies would do well to provide a disclaimer at the outset of the call, whether or not the state of residence requires it.

It is also imperative to stay abreast of legal developments in state and federal courts nationwide. The decisions discussed above, for example, emphasize that in the event a class action complaint is filed against a company it is important to consider whether the plaintiff fails to allege actual "eavesdropping" of the conversations. In addition, given the Superior Court's finding that CIPA does not apply to calls made over VoIP, companies should consider using VoIP if not already doing so. And, of course, if the company is using VoIP and faces a call-recording class action, the company should consider moving to dismiss CIPA claims on that basis. Finally, while the court in *Gruber v. Yelp* did not entirely foreclose the possibility that a one-way recording could result in a CIPA violation as a matter of law, defendants can use the order to persuade plaintiffs counsel and judges that arguments similar to *Gruber's* fail.

In light of the significant statutory damages, and because this area of law is evolving, businesses faced with Section 632 and Section 632.7 class actions should retain experienced counsel, not only to defend them, but to review their current recording policies and procedures.

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The authors want to thank summer associate Edward Fallas, who assisted with this article.

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[1] SF Sup. Ct. Case No. CGC-16-554784

[2]

[3] 2018 U.S. Dist. Lexis 65561, 17-cv-02264-JSC (April 18, 2018).

[4] Id at *5.

[5] Id. at *20.

[6] Id. at *23.

[7] 2018 U.S. Dist. LEXIS 3227

[8] Id. at *5.