

## **CIPA SUNDAY: ACTIVE PROSPECT SCORES ANOTHER WIN – BUT THE BATTLE ISN'T OVER: Motion to Dismiss Javier's Complaint Granted But Court Rejects Two Critical Arguments**

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Happy CIPA Sunday folks!

ActiveProspect recently achieved a partial win in *Javier v. Assurance IQ*, with their motion to dismiss being granted on grounds that plaintiff Javier had failed to plead facts necessary for invoking the delayed discovery doctrine – a conclusion drawn after the court recognized Plaintiff was aware of his injuries via visiting Assurance's website back in January 2019 and thus the 1 year statute of limitations had passed. Nevertheless, it wasn't all good news as two out three of Defendants' arguments were rejected by the court and Plaintiff was given an opportunity to amend his allegations.

Backing up — recall, the 9<sup>th</sup> circuit in [\*Javier v. Assurance IQ and Active Prospect Inc.\*](#), held that the use of technology on websites, like Active Prospect's TrustedForm, without affirmative consent may be a violation of California's wiretap statute. While the court found that *Javier* alleged sufficient facts to plausibly state a claim under Section 631(a) that his communications were recorded by ActiveProspect without his valid express prior consent – the Ninth Circuit did not address the Defendants' other arguments: “(1) Javier impliedly consented to Assurance and ActiveProspect's collection of his data; (2) ActiveProspect is an “extension” of Assurance, rather than a third-party eavesdropper; and (3) Javier failed to plead requisite facts to assert delayed discovery, thus requiring dismissal on statute of limitations grounds.”

The arguments were left to the district court to review and addressed each in its recent ruling:

*First*, the court rejected Defendant's argument of implied consent as it failed to provide evidence that Javier had consented to Active Prospect's collection and usage of his information – only evidence that Javier may have impliedly consented to Assurance's collection of his information.

Additionally, Defendants failed to demonstrate that Javier continued to use the website after he had notice that his communications “may be intercepted” by Active Prospect.

Consequently, Defendants argument relying on implied consent was not a basis for dismissal of Javier's Section 631 claim against Active Prospect at this stage.

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Next, the court was unconvinced by Defendants' argument that Active Prospect was an "extension" of Assurance, ruling Javier plausibly alleged that Active Prospect was a third party under Section 631.

In its assessment, the district court looked at the key language from Cal. Penal Code Section 631(a):

(1) where a person "by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection ... with any telegraph or telephone wire, line, cable, or instrument";

(2) where a person "willfully and without 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";

(3) where a person "uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained"; and

(4) where a person "aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above."

Javier accused Active Prospect of violating the first prong and Assurance for breaching the fourth prong under Section 631.

The district court studied two sets of cases with opposing outcomes – one set ruled software providers like AP as third parties while other decisions declared them to be "extensions" of websites that use their services (such as in [\*Williams v What If Holdings & Active Prospect\*](#).) Conclusively, it was determined Active Prospect resembled more like a third party eavesdropper than a "tape recorder" which aligned itself within CIPA's protective parameter against unlawful interceptions by third parties.

After rejecting Defendants' first two arguments, the court granted Defendants' motion to dismiss on the grounds that Javier failed to plead facts necessary to invoke the delayed discovery doctrine. Unlike the TCPA's 4 year statute of limitation, the CIPA has a one year statute of limitations. The "delayed discovery doctrine" states the statute of limitations on bringing a claim does not start running until a claimant discovers the injury that forms his or her lawsuit and a claimant can toll the statute of limitations by alleging he or she did not know of the injury until a later date.

Javier's alleged Section 631 violation occurred in January 2019 yet he did not file suit until April 2020 — so he must have pleaded facts that toll the 1 year statute to bring his claim. Javier contends he was unaware of Active Prospect's involvement until April 2020 but "assumed" Assurance was collecting his information in January 2019.

The court clearly concluded that if Javier – by his own admission – was aware of Assurance's collection of his information in 2019 then he also had constructive notice of the "Privacy Policy which stated that Assurance 'may use third party vendors to assist' it with the collection of visitor's personal information, including "monitoring and analyzing Site activity."

***"because Javier states that he was aware that Assurance was collecting his information in January 2019 despite alleging a direct Section 631 injury, and had constructive notice that a third party may be aiding it in that process, Javier does not plausibly plead that he was unable***

***to discover Assurance's use of ActiveProspect's software despite reasonable diligence. After all, he received the VideoReplay recording promptly after sending the letter alleging TCPA violations. See Swenson Decl. Ex. C–D (attaching Plaintiff's counsel's letter sent on March 31, 2020, and the email chain sending Plaintiff's counsel the recording, dated April 10, 2020). There is no reason to expect that Plaintiff's counsel would have been any less successful if they had reached out before January 2020.***

While Plaintiff was granted leave to amend his delayed discovery allegations, the court's decision was clear: Javier had an understanding of Assurance collecting his information in 2019, and also assented to a Privacy Policy that disclosed possible monitoring by third parties – like Active Prospect. It'll be interesting and surprising to see if Plaintiff's amended allegations will survive.

While we are still stuck with some unfavorable rulings by this CA district and the Ninth Circuit ruling in *Javier v. Assurance*, we are rooting for an ultimate win for Active Prospect!

We'll keep an eye out on this one for you.

And for you folks at LGW — looking forward to seeing you shortly! Have a great rest of your Sunday.

XOXO

-CIPA Queen

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