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Class Action Year in Review: Wiretapping Update From Class Action to Mass Arbitration

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In 2023, we saw the continued proliferation of class action lawsuits filed by "consumer watchdog" plaintiffs under state wiretapping laws, particularly the California Invasion of Privacy Act (CIPA), against website operators that use standard online technologies, such as chat boxes and cookies — the latter of which do not even monitor "communications."

However, in 2023, CIPA plaintiffs pursued these claims with a different strategic twist compared with how they approached these lawsuits in 2022. The plaintiffs' bar's more recent strategy is to file mass numbers of individual arbitration demands under the website operator's arbitration agreements in an attempt to drown the website operators with hundreds or thousands of CIPA claims at once, rather than to file them as class action lawsuits. This new procedural tactic has caused website operators to incur increased expenses, burdens, and resources to fight these meritless claims.

Background on CIPA Claims

CIPA was enacted with the purpose of protecting residents of California from privacy violations that occur when communications are recorded without their knowledge or consent. As reported in our prior alert, these lawsuits — particularly the California chat lawsuits filed by Scott Ferrell of Pacific Trial Attorneys — follow a nearly identical script. A "litigation tester" will visit a website and (allegedly) use the ubiquitous chat feature on the target retailer's website to voluntarily communicate with a customer service representative. And that's really it. In some cases, the repeat plaintiff simply clicks or types "returns," and then immediately leaves the chat session — many times without even purchasing goods from the retailer. And *like that, the plaintiff's lawyer* sends out a form demand letter offering to settle a threatened CIPA lawsuit for six figures on an individual basis, or for tens of millions of dollars on a class-wide basis. When that shakedown attempt doesn't work, the plaintiff's lawyer files a cookie-cutter lawsuit filled with hyperventilating allegations that the plaintiff was "*shocked* and appalled" to discover that the "Defendant secretly records those conversations and pays third parties

to eavesdrop on them in real time."

You heard it, *the plaintiff* writes — records — something on a company's *public* website, and because a third-party technology company is providing the underlying chat service, the lawsuit is based on unexplained "eavesdropping" by the service provider. That is, the website operators are not accused of being the *primary* violators of the state wiretapping law, but instead of "aiding and abetting" eavesdropping on their own websites because they use a technology vendor.

More recently, however, the CIPA plaintiffs' bar has stretched these claims even further, with the likes of Josh Swigart claiming that a consumer simply visiting a website with data analytics cookies deployed is sufficient to state a claim. Ironically, however, these plaintiffs' firms often do not realize, or simply don't care, that they have the *same* cookies deployed on their websites.

Reaction by the Bench in 2023

In 2023, judges in the state and federal courts around California had mixed reactions to such claims, with many courts dismissing them (often without leave to amend) and some allowing them to proceed in part or in whole on the "merits." One federal court judge sharply criticized plaintiffs' attorneys' use of "copy and paste" complaints, holding that "all reasonable people should agree" the practice of boilerplate pleadings has gone too far, and the CIPA plaintiffs' bar "blew past it." Most recently, Los Angeles Superior Court complex department Judge William Highberger sustained a luxury fashion retailer's demurrer to a CIPA complaint *without* leave to amend in the first instance, dealing a blow to the plaintiff and requiring her to pay the retailer's costs of suit as the prevailing party as required under California law. Judge Highberger accepted the interpretation that parties to a communication are *categorically* immune from Section 631 liability, and communicating with a website cannot possibly violate Section 632.7 of CIPA (which is facially limited to only certain wireless phone-to-phone communications).

The CIPA Plaintiff's Bar Shifts Strategies

CIPA plaintiffs have been forced to alter their litigation strategy based on the varied results they have faced in state and federal courts in California in 2023. While some have simply taken their ball and went back to state court, other firms have escalated their tactics by filing mass numbers of demands for arbitration, sometimes in the thousands, under the retailer's arbitration clauses within the terms and conditions on the retailer's website. One problem with this strategy, however, is that in most of these cases, the claimants are effectively a swarm of digital slip-and-fall plaintiffs who only visit the website for the sole purpose of generating a "claim," and never purchased any goods or services from the retailer's website. Leaving aside the specific scope of any particular arbitration clause, arbitration agreements are exactly that: agreements. Under basic contract law, *any* agreement requires offer, acceptance and *consideration*. And our basic view is that visiting a website to simply generate a bogus "privacy" claim is rather *in*considerate.

Notably, on January 15, the American Arbitration Association (AAA) issued its Supplementary Mass Arbitration Rules in part "to provide parties and their representatives with an efficient and economical path toward the resolution of multiple individual disputes." While these rules were designed to "streamline the administration of large volume filings involving the same party," it goes without saying that arbitration can, under the circumstances described in this release, become an expensive litigation tool, particularly when considering AAA's fees, the arbitrator's hourly rate, and the defendant's attorneys' fees who are faced when challenging hundreds of similar lawsuits at once.

But, the good news is, website operators have options to reduce or at least manage these mass filings.

Options for Managing or Minimizing Mass Arbitration Demands Under CIPA

Given the recent shifting strategy of CIPA plaintiffs in California, website operators should consider the following options to manage or minimize mass arbitration demands filed alleging violations of CIPA:

1. **Mandatory Informal Dispute Desolution:** One option is to add a rigorous informal dispute resolution clause to such arbitration agreements, requiring plaintiffs to disclose all facts and documents supporting their claim, which the website operator would review and respond to within a specific time period, for example, 60 days. The clause would require a meet and confer conference amongst counsel prior to filing a demand for arbitration, with the option of requiring mediation before filing an arbitration demand.
2. **Bellwether or Batched Arbitration:** Under bellwether or batched arbitration, the parties select a certain number of claims (e.g., 10, 50, or 100) for arbitration, while the remaining claims are stayed or grouped into a different batch that will be processed as a “mini-class action.” The initial set of claims are essentially test cases. The idea is that the outcome of these claims will give the parties a sense of how the remaining claims are likely to be decided, which, in turn, may incentivize settlement. If the parties are unable to settle after the initial claims are decided, a second set of claims are selected for arbitration. The arbitration proceeds in this manner until all claims are settled or arbitrated.
3. **Mass Arbitration Carve-Out:** Another option is to include in the arbitration provision an exclusion of “mass arbitration,” which is typically defined as any group of 25 or more filings from the same or coordinated counsel against the same company at the same time. Rather than arbitrating these claims, the claimants would be required to proceed in court.
4. **Remove the Arbitration Provision Altogether:** A final option is to remove arbitration provisions altogether, preferring to litigate all claims in court rather than risk the possibility of mass arbitration and the accompanying fees.

If you are on the receiving end of a wiretapping demand letter, complaint, or arbitration demand, know that you do have options to fight it.

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