Privacy & Cybersecurity Update

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New Ruling on Punitive Damages and Attorney Fees in California Invasion of Privacy Act (CIPA) Case

As Thompson Hine has previously reported, the recent surge of privacy claims under the California Invasion of Privacy Act (CIPA) related to using website cookies, pixels, and web beacons continues to impact several sectors. It has been especially harmful to small businesses. On July 15, Judge Rolf Treu ruled on a preliminary motion in a CIPA lawsuit and concluded that the plaintiff could potentially recover punitive damages and attorney fees. Although this case does not address the merits of whether website tracking technologies are considered pen registers or trap and trace devices under CIPA, plaintiffs may rely on it to demand larger awards and settlements in their CIPA actions. Businesses that deploy these types of online tracking technologies should immediately reassess the legal terms governing the use of their websites and whether they contain favorable dispute resolution provisions, such as remedies available for claims arising from a consumer's use of the website.

The CIPA Complaint

On January 30, 2024, Plaintiff Monica Sanchez filed a complaint against Defendant Unite Eurotherapy, Inc. alleging, among other claims, that the defendant's publicly facing website "secretly deployed spyware" on the devices used by consumers who accessed its website. *See Sanchez v. Unite Eurotherapy, Inc.*, Los Angeles County, Case No.: 24-ST-CV-02282. The plaintiff categorized this activity as the equivalent of "install[ing] 'pen register' and 'trap and trace' software in violation" of CIPA.

The complaint also notes that the plaintiff is a "consumer privacy advocate who works as a 'tester' to ensure that companies abide by the privacy obligations imposed by California law." It further states that the defendant has embedded "at least" one pen register and trap and trace device beacon within its website. However, the specific beacon at issue is not actually identified in the complaint to "deter 'copycat' litigation."

The general nature of this complaint aligns with the "template" pleading used by this plaintiff and her counsel in other CIPA matters. In fact, one California judge is on record describing the plaintiff's counsel as a "serial litigant[] bringing numerous 'cookie cutter' lawsuits under CIPA against various businesses that operate websites."

Request for Damages and Motion to Strike

The complaint states that the plaintiff suffered "economic injury" and "intangible injury to [her] dignity by the violation of the plaintiff's right to privacy." Importantly, paragraph 30 of the complaint provides that "[b]y knowingly violating" CIPA (which is a criminal statute), the defendant acted with "oppression and malice" and therefore the plaintiff is entitled to punitive damages. Further, paragraph 31 of the complaint states that the plaintiff is entitled to certain relief, including statutory damages, punitive damages, and attorneys' fees.

On March 6, 2024, the defendant filed its formal answer to the complaint, wherein it denied: each allegation in the complaint, that the plaintiff was injured or damaged in the amount or manner alleged in the complaint, and that she is entitled to any relief whatsoever.

The defendant also filed a motion to strike, which requested the court to strike both: (i) paragraph 30 of the complaint (i.e., the "oppression" and "malice" allegation and entitlement of punitive damages) and (ii) references to punitive damages and attorneys' fees in paragraph 31. It states that the allegations in the complaint "are woefully deficient because the plaintiff failed to identify an officer, director, or managing agent of the defendant, failed to show that such an individual knowingly ratified the alleged wrongful conduct, and failed to show that the alleged conduct was 'despicable.'" It also claims that the statutory penalty outlined in CIPA is the plaintiff's exclusive remedy (and the plaintiff is not entitled to both statutory damages and punitive damages), and her request for attorneys' fees is "without any supporting allegations or overall entitlement."

The Court's Ruling

On July 15, Judge Treu denied the motion to strike and in doing so allowed the plaintiff's complaint to move forward with both the request for punitive damages and attorney fees.

Punitive Damages. Regarding punitive damages, the court noted that "[t]o state a claim for punitive damages" under the law "a plaintiff must allege specific facts showing that the defendant has been guilty of malice, oppression or fraud." The court then defined these terms with specificity and noted that a "motion to strike may lie where the facts alleged, if proven, would not support a finding that the defendant acted with malice, fraud or oppression."

Importantly, Judge Treu stated that the "basis for punitive damages must be pled with specificity; conclusory allegations devoid of any factual assertions are insufficient." Further, "a plaintiff must," according to the court's ruling, "allege facts demonstrating that 'the defendant acted in such an outrageous and reprehensible manner that the jury could infer that he [or she] knowingly disregarded the substantial certainty of injury to others.'" These "allegations must be sufficient for a reasonable jury to conclude that Defendant's conduct was 'despicable' defined as 'base, vile or contemptible.'"

According to Judge Treu, the complaint "states sufficient facts" to support the request for punitive damages. Here, the judge recites the following allegations in the complaint:

- When Plaintiff visited the defendant's website, the defendant secretly accessed the plaintiff's device and installed spy tracking software.
- The tracking spyware embedded at least one pen register and trap and trace device beacon to discover the identity and geolocation of every website visitor.
- This conduct is prohibited without obtaining a court order under California law first.

Judge Treu concluded that a reasonable jury could find both that the defendant's conduct (i) of engaging in purported criminal activity is *vile or contemptible*, and (ii) of intentionally invading consumers' privacy without their knowledge or consent was done with *willful and conscious disregard* to the privacy rights of their website visitors. When issuing his ruling, Judge Treu ignored one of the core criticisms of these types of CIPA complaints, which states that they only contain conclusory allegations derived from "cookie cutter" templates that have a "high level of generality" because they merely "copy and paste" the same allegations over and over again.

The court also found that under binding California judicial precedent, a plaintiff can, in the pleading stage, request both statutory penalties and punitive damages. Therefore, the statutory remedy under CIPA is not the plaintiff's exclusive remedy at this time, as argued by the defendant.

Attorney Fees. Compared to his analysis of punitive damages, Judge Treu addressed the issue of attorney fees rather succinctly. Here, the judge recited, in relevant part, the provisions within California's Code of Civil Procedure that authorized a court to award attorney fees in any legal proceeding which has resulted in the enforcement of "an important right affecting the public interest" if the following factors are present:

- A significant benefit has been conferred on the general public or a large class of persons

- The necessity and financial burden of private enforcement, or enforcement by one public entity against another public entity, are such as to make the award appropriate
- Such fees should not in the interest of justice be paid out of the recovery, if any

Judge Treu agreed with the plaintiff's allegations that "the right to privacy is a legally protected interest" and that she initiated the lawsuit to "enforce her right to privacy under CIPA and other California website users." Therefore, Judge Treu summarily found that if the plaintiff "ultimately prevails in this action, she may be awarded attorneys' fees" by California law.

Conclusion

For many businesses, deploying tracking technologies on a corporate website is a simple and common approach to enhance an end-user's website experience and ensure a more productive and efficient marketing program. Judge Treu's ruling, however, increases the risk that deploying such technologies could result in legal claims wherein plaintiffs believe they are entitled to significant punitive damages and attorney fees for CIPA violations.

FOR MORE INFORMATION

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