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Courts Disagree About the Calculation of Statutory Damages for the California Invasion of Privacy Act

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The California Invasion of Privacy Act (CIPA) prohibits two types of conduct – the interception and the recordation of communications without the consent of all parties to the communication. While CIPA's prohibition of interception has been applied in the email and mobile application context, the vast majority of recent class actions have focused on the recording of telephone calls, primarily those made to or from cellular telephones. In addition to providing for civil penalties, the statute includes a private right of action allowing for $5,000 in statutory damages. An amendment effective January 1, 2017 specified that the statutory damages are "per violation." See Cal. Penal Code § 637.2(a)(1).

Two courts recently disagreed as to whether this amendment reflected a **change** to the method of calculating damages or a **clarification** of the existing methodology. If the amendment reflected a change to the statute, it would not be applied retroactively. If it was a clarification, the current interpretation would apply to violations that occurred before the amendment. These differing interpretations markedly affect potential exposure for defendants facing CIPA class claims regarding conduct that took place prior to January 2017.

The January 1, 2017 amendment to CIPA

Prior to the statutory amendment, California Penal Code Section 637.2(a) read:

> (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:
>
> 1. Five thousand dollars ($5,000).
>
> 2. Three times the amount of actual damages, if any, sustained by the plaintiff.

The entirety of the January 2017 amendment was to insert the words "per violation" after "Five thousand dollars ($5,000)."

Interpretations of "per violation" statutory damages under CIPA

In *Lal v. Capital One Financial Corp.*, an individual call recording action, the Northern District of California held that this amendment created a new right to damages on a **per violation** basis, and that, prior to the amendment, a successful CIPA plaintiff was entitled to only $5,000 per **action**. No. 16-CV-06674-BLF, 2017 WL 1345636, at *9 (N.D. Cal. Apr. 12, 2017). The *Lal* court based its ruling on a number of factors. First, the *Lal* court held that a plain reading of the statute prior to amendment limited a plaintiff's recovery to the greater of $5,000 or three times actual damages. *Id.* at *5. Citing a case interpreting a similar provision in the California Penal Code that did not contain the phrase "per violation," the court held that it was not inclined to read the qualifying language "per violation" into the statute. *Id.* Second, the court did not give precedential value to prior cases alluding to damages per violation when no court had directly addressed the issue. *Id.* at *6. Finally, given that the statute was not ambiguous, the court noted that it was not required to look to legislative history. Nevertheless, the court found the legislative history supported its interpretation, because the Legislative Counsel's Digest specified that the bill was "to amend" the relevant section of CIPA and "explicitly state[d] that 'this bill would provide that the monetary damages be imposed per violation' in the context of a civil suit." *Id.* at *7. The court rejected the legislative history proffered by the plaintiff as predating the amendment in question and relating entirely to criminal penalties. *Id.* The plaintiff in *Lal* has appealed the Northern District of California's holding to the 9th Circuit.

Last month, the Southern District of California came to the opposite conclusion, holding that a plaintiff is entitled to recover $5,000 per violation for calls taking place before January 1, 2017. *Ronquillo-Griffin v. TELUS Commc'ns, Inc.*, No. 17CV129 JM (BLM), 2017 WL 2779329, at *6 (S.D. Cal. June 27, 2017) (stating that the court "respectfully disagrees with the holding in *Lal*").

In *Ronquillo-Griffin v. TELUS Communications, Inc.*, the court found that the pre-2017 statute was ambiguous and subject to multiple interpretations. *Id.* And the court found that the legislative history of the amendment revealed that its purpose was to clarify, rather than change the statute's meaning, because the term "clarify" was used multiple times in discussing a similar amendment to the criminal penalties provision. *Id.* at *7. Although the *Ronquillo* court focused on some of the same legislative history that the court in *Lal* had rejected as "not squarely on point," 2017 WL 1345636, at *7, it found that since the Legislature intended "to clarify" the criminal penalties provision by inserting the phrase "per violation," it was logical that it intended to similarly "clarify" the statutory damages provision, even though the criminal penalty amendment predated the statutory damages amendment. Finally, while acknowledging that prior courts had not directly addressed the issue, the *Ronquillo* court found that prior case law was generally supportive of its interpretation. *Id.* at *8.

While prior courts may have assumed, without reaching the issue, that the statute was per violation, the plain language of the unamended statute allowed a plaintiff to bring only "an action ... for ... Five thousand dollars." The *Ronquillo* court failed to address the body of cases relied upon by the *Lal* court for the proposition that a court is not permitted to read the phrase "per violation" into a statute. *See Lal*, 2017 WL 1345636, at *5 (citing, *inter alia, In re Sandoval*, 341 B.R. 282, 292 (Bankr. C.D. Cal. 2006)). Moreover, the *Ronquillo* court focused on the legislative history of an amendment to a different provision in CIPA and one that predated the civil penalties provision amendment.

Conclusion

These two district court decisions suggest that defendants potentially face significantly higher exposure in CIPA cases pending in the Southern District of California than those in the Northern District. Barring new case law on the issue and given the one-year statute of limitations applicable to CIPA claims, it may be that new CIPA filings will dwindle in the Northern District for the remainder of 2017, until all conduct at issue in new filings took place on or after January 1, 2017.

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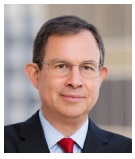

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