RISK Alert

ACTIONABLE INSIGHTS FOR BOND POLICYHOLDERS.

CUNA MUTUAL GROUP

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Demand Letters and Lawsuits Center on Wiretap Violations at Credit Unions

In 2022, a nationwide rise in litigation activity centered on wiretapping violation claims was reported involving companies use of "session replay" technology. This trend continues to grow as plaintiff attorneys have initiated a string of demand letters and lawsuits against credit unions alleging that customer-facing live chat tools violate state wiretap acts such as California's Invasion of Privacy Act ("CIPA") by secretly recording communications, intercepting, and eavesdropping said communications in real-time.

The law firm at the forefront is the same that alleged credit union websites were in violation of the Americans with Disabilities Act.

Details

California courts have seen a significant uptick in putative class actions under Section 631 et seq., of California's "wiretapping" statute (CIPA), (California Penal Code Sections 630 et seq). These recent filings target the live chat functionalities commonly found in customer-facing websites.

Under CIPA, a claim may be brought against anyone who "reads, or attempts to read, or to learn the contents" of a communication "without the consent of all parties to the communications" in violation of the California law. Cal. Penal Code § 631. CIPA provides a right against the invasion of privacy for California state residents. It creates a private right to action with a "$5,000 per violation" statutory penalty without having to prove actual damages.

Approximately 13 states have state wiretap act; however, litigation activity is most notable in California, Florida, Illinois, and Pennsylvania. Wiretap statues are often criminal statutes and codes thus, the rise in these class actions suits can create a risk of criminal and civil penalty exposure for organizations that become defendants in these cases.

Similar to session replay, these chat tools lawsuits allege that the third-party vendor (e.g., chat function tools) has simultaneous, real-time access to the chat communications without the consent or knowledge of the website user. This results in claims that the website operator is "aiding and abetting" the third-party vendor in violation of California Penal Code § 631.

In a recent case involving a website visitor using the chat box feature of a webpage, California's Federal Court decided that chat box is wiretapping and allowed the lawsuit to continue with the claims of intentional wiretapping and lack of consent, both which are violations under CIPA. Chat box cases differ from session replay in that the court considered chat box conversations to be read or interpreted in real-time during the transmission where someone is actively listening (e.g., eavesdropping) and they are reading and responding to it usually operated by third party (e.g., vendor).

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Risk Category:
Litigation; Demand Letters; Compliance; Wiretapping; Privacy; Data Privacy; CIPA

States:
California; Florida; Illinois; Pennsylvania; All

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Facing risk challenges?

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Risk Mitigation Tips

It is important for credit unions to work with legal counsel to ensure that its website policies and technologies comply with privacy laws and wiretap laws of each state where its website is accessed.

In addition, credit unions should consider:

- **Create or Update Privacy Policies** – By publicly posting a privacy policy on websites, credit unions can provide visitors with notice that session replay software, chat box features, and other analytics tools are used, and further identifying what data is collected, what data is shared, with whom, and for what purposes.
- **Revise Terms of User Agreement** – You may require customers/members to accept a user agreement before engaging with your website, submitting information, and/or completing a purchase. The user agreement can set the standard for potential dispute resolution with the customer/member, potentially including a provision requiring that disputes be addressed on an individual basis through arbitration rather than class action litigation. It can also establish a particular forum for any disputes to decrease the chances of being sued in multiple jurisdictions across the country.
- **Obtain Affirmative Consent** - If your website uses session replay technology that captures a website user's communications in states where all parties to a communication are required to give consent; you should ensure visitors' affirmative consent is obtained at the onset of the users' interaction with your website. Simply disclosing the use of session replay technology is not considered sufficient.

  One method of obtaining users' affirmative consent is to deploy a pop-up banner disclosing the credit union's data collection practices that users must agree to (e.g., by using an "I agree" checkbox). Credit unions should maintain a record of users' consent (session replay vendors may provide this service).

  The banner should contain a link to the credit union's updated cookie or privacy policy that describes session replay or similar technology to ensure the consent is linked to the credit union's use of such technology.
- For credit unions that use chat box tools in their websites should consider including at the onset of the conversation a statement that provides notice of the recording and obtain consent from the visitor before the chat conversation begins. If the visitor declines to grant permission, then the chat ends.
- To the extent credit unions incorporate "live chat" applications into their site, they should audit that functionality to determine whether, as is often the case, a third-party vendor has simultaneous, real-time access to those chat communications.

  If so, credit unions should ensure that this functionality is adequately disclosed up front to website users in a manner that qualifies as the user's consent. These disclosures should be clear and conspicuous under federal and state standards, particularly given plaintiffs' arguments that they may have used a website's chat function prior to noticing – or affirmatively agreeing to – a website's terms and conditions.

If a lawsuit is filed against your credit union or you receive a demand letter threatening legal action; policyholders should immediately report it to CUNA Mutual Group. You can submit claims online or via email at litigation.team@cunamutual.com.

Risk Prevention Resources

Access CUNA Mutual Group's Protection Resource Center at cunamutual.com for exclusive risk resources, RISK Alerts, and on-demand webinars (User ID and Password required).

- Session Replay Software Litigation Alleges State Wiretap Act Violations